Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

GONZALO BARRIENTOS, *et al.*,
Appellants,

v.

STATE OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the district court erred in dismissing Appellants' claim that the Texas Legislature's change from requiring a two-thirds vote to consider legislation to a simple majority requirement, which was applied solely to congressional redistricting legislation, was a change requiring preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

2. Whether, under Section 5 of the Voting Rights Act, a covered jurisdiction must submit for preclearance to either the United States District Court for the District of Columbia or the Attorney General a change it makes in practices or procedures targeted solely to redistricting legislation?

PARTIES TO THE PROCEEDING

Actual parties to the proceedings below were:

(1) Gonzalo Barrientos, Rodney Ellis, Mario Gallegos, Jr., Juan "Chuy" Hinojosa, Eddie Lucio, Jr., Frank L. Madla, Eliot Shapleigh, Leticia Van De Putte, Royce West, John Whitmire, and Judith Zaffirini, plaintiffs, appellants, herein;

(2) State of Texas, defendant;

(3) Rick Perry, Governor of the State of Texas, defendant; and

(4) David Dewhurst, Lieutenant Governor of State of Texas and presiding officer of the Texas Senate, defendant.

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STATE OF TEXAS, *et al.*,
Appellees.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court is reported at ___ F. Supp. 2d ___, 2003 WL 22113910, S.D. Texas, September 12, 2003, and is reprinted at App. 1a-4a.

JURISDICTION

The Memorandum and Order denying plaintiffs' motion for preliminary injunction was entered on September 12, 2003. Appellants filed a notice of appeal on September 22, 2003. App. 5a-6a. The jurisdiction of this Court rests on 42 U.S.C. § 1973c and 28 U.S.C. § 1253, and 22 U.S.C. § 2284.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, is set forth in App. 26a-27a.

STATEMENT OF THE CASE

Appellants appeal the dismissal by a three-judge federal district court of their claim that a change in the practices and procedures of the Texas Senate (hereafter "the Senate") targeted exclusively to congressional redistricting legislation requires preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Specifically, appellants claim that the abandonment of the Senate's usual practice of requiring the votes of a supermajority of two-thirds or better to take up legislation[1] – a change applied only to this year's controversial Texas congressional redistricting bill – is a change in a "standard, practice, or procedure with respect to voting" within the meaning of Section 5. The district court's ruling that no change in a legislature's internal operations – no matter how focused on election procedures and no matter how consequential in affecting election outcomes – can be a covered change is without support in the Act or this Court's decisions.

Appellants are eleven voters and State Senators from Texas. App. 8a They represent the only minority opportunity Senate districts in the State; seven of the appellants are Hispanic, two are African-American, and the

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[1] The State of Texas conceded below that Texas has a "tradition" of using a practice or procedure that forces a supermajority 2/3 vote on bills in the Senate if they are taken out of order. See Defendants' Motion to Dismiss at 4 (calling the use of a blocker bill a "tradition") and at 4, note 1 (referring to the blocker bill as an "informal tradition").

remaining two are Anglo Senators who represent majority-minority districts. App. 8a. Ten of the 11 districts appellants represent are majority-minority and the eleventh is approximately 45% minority in total population. *Id.* Appellants constitute more than a third of the thirty-one member Texas Senate and wished to avail themselves of the supermajority practice or procedure in the 2003 special session on redistricting.

Prior to 2003, the Senate had used a practice or procedure whereby congressional redistricting bills could only reach the floor of the Texas Senate if they obtained the support of a supermajority (two-thirds or better) of the Senators present. In 2003, the State changed the Rules to allow congressional redistricting legislation to be considered and passed with the support of a mere simple majority. Furthermore, the State made the change from a supermajority to a simple majority rule only applicable to congressional redistricting legislation.

The record below is unambiguous with respect to the procedures used in the Texas Senate for enacting congressional redistricting legislation. The use of the supermajority requirement extends back over many decades and was detailed below by two experts on Senate practices and procedures. App. 30a-60a. These sworn statements do not differ on the fundamental factual basis for appellants' claim that the Texas Senate has used some kind of supermajority requirement or practice each time it has enacted congressional redistricting legislation and that this practice was changed in 2003.

In the Texas Senate, bills emerging from Senate committees are placed on a list in the order in which they were reported from the committees. App. 36a. This list is

called the "Senate Calendar." If the Senate followed "the regular order of business," it would consider the bills in the order they appear on the calendar and the Senate would not be able to consider a bill listed somewhere down the calendar until it had completed action on all those that precede it on the list. *Ibid.* But the Senate often suspends the regular order of business, a "tradition" whereby bills may be "brought up out of the regular order" by a suspension motion. *Id.* The suspension motion requires a two-thirds vote and is designed to ensure that, before a bill comes to the Floor, it has the support of an overwhelming percentage of the senators. *Id.* It also gives the Senate a way to move important bills directly to the Floor, bypassing the many less significant measures that may precede it on the calendar. *Id.*

The usual practice or procedure that the Senate has used to ensure that no bill comes to the floor unless it has support from a supermajority of senators has been to place or "park" a bill at the very top of the calendar that it never intends to pass. App. 44a. This bill--known as the 'blocker'--serves as a barrier to consideration of all other legislation unless the regular order of business is suspended. *Id.* No effort is made to debate and pass the blocker bill; consequently, none of the bills behind it on the calendar can be considered unless a motion is made to suspend the regular order of business. The motion to suspend requires the support of two-thirds of all the senators present and voting at the time. This means that if all 31 senators are present, it will require 21 votes in favor of the motion to bring up the bill. If 30 are present, it will take 20, and so forth.[2] *Id.*

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[2] What makes the Senate's procedure unusual is that, once a normal bill or resolution has been moved off the calendar for debate by suspending the rules, only a simple majority vote is then needed for the Senate to

The evidence adduced below showed that blocker bills have been used to require supermajority support for congressional redistricting bills in the past and that in other instances the Texas Senate effectively accomplished the same thing by requiring a supermajority vote to suspend other rules prior to the consideration of redistricting legislation. Of the greatest significance is what occurred in 1971, immediately prior to the time when section 5 of the Voting Rights Act became applicable to Texas. In the 1971 regular session, the Texas Senate voted to suspend the regular order of business by unanimous consent to take up congressional redistricting. To suspend the Regular Order of Business requires an extraordinary or supermajority vote of the senate (a two-thirds vote). The Legislature ultimately failed to enact a congressional redistricting bill, however, and the matter was taken up in a special session. "In the first called special session of 1971, congressional redistricting legislation passed by a combined motion to Suspend the Regular Order of Business, pass on Second Reading, Suspend the Constitutional Rule and Pass on Third Reading. This practice or procedure required an extraordinary or supermajority of votes in order to pass." App. 49a.

"Thus, as of 1971, the practice or procedure used by the Texas Senate in considering congressional redistricting employed an extraordinary majority requirement before the full Senate would consider such legislation." App. 49a. That is the benchmark "practice or procedure" used by the Texas Senate at the time Section 5 of the Voting Rights Act took effect in Texas (*i.e.*, November 1, 1972).

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pass it. Thus, while it only takes 16 votes to pass a bill--if all 31 senators are voting--it takes five more votes just to allow the bill to reach the floor for discussion. App. 44a-45a.

Similar patterns continued in later years. "In 1981, Congressional Redistricting in the Senate during the 67th Legislature was governed by the terms of a Senate Resolution (SR 256), which provided that reapportionment measures were to be placed before the Senate under a Special Order, rather than by a Suspension of the Regular Order of Business. SR 256 was adopted by the Senate by a vote of 27 Aye, 1 Nay, and thus was approved by a supermajority." App. 49a-50a. "SR 256 established that these Special Orders would require only a majority vote for adoption, rather than the two-thirds vote normally required to set a Special Order. The specific provision providing for a Special Order by a majority vote was adopted on a separate vote of 21 Aye, 7 Nay—again a supermajority (three-fourths) of senators." App. 50a.

"In 1991, an attempted suspension of the Regular Order of Business by unanimous consent, failed; then the Senate voted to suspend the Regular Order of Business, a measure that requires two-thirds of the Senate, by a vote of 21 Aye, 10 Nay. Thereafter, the congressional redistricting bill passed on Second Reading by a voice vote, which was then followed by a vote to Suspend the Constitutional Rule (which requires an extraordinary or supermajority vote of three-fourths of the senate) by a vote of 26 Yeas, 5 Nays. The Constitutional Rule of having a bill lay over for three days having been suspended, the [congressional redistricting] bill was then approved on Third Reading by a vote of 18 Yeas, 13 Nays." App. 50a.

In 2001, the Texas Legislature was under split control: Republicans controlled the Texas Senate, but Democrats controlled the Texas House. Congressional redistricting bills did not reach the Senate floor in 2001 because 11 Senators announced that they would not support suspension of the

regular order of business. "At that time, the chair of the Senate Redistricting Committee (State Sen. Jeff Wentworth (R-San Antonio), was publicly quoted as stated that he would be unable to obtain the necessary two-thirds vote to bring a bill to the Senate Floor." App. 51a. The supermajority procedure used in the Texas Senate thus precluded consideration by the full Senate of any congressional redistricting legislation.

Since the State failed to draw new congressional districts after the 2000 census and 2001 congressional reapportionment, a three-judge federal court adopted a congressional map in 2001 and imposed it on the State of Texas. This Court summarily affirmed that judgment. *Balderas v. Texas*, 536 U.S. 919 (2002). The 2002 congressional elections were held under the court-drawn map. That same year, the Republicans won a majority of seats in the Texas House of Representatives and, with it, unified control of the state government.

In 2003, the Texas Legislature took the unprecedented step of replacing a perfectly lawful congressional districting plan after it had been used in one or more elections and before the next census. During the 2003 regular session, only the Texas House took up congressional redistricting, but the bill died when Democratic Representatives in the State House left the State and went to Ardmore, Oklahoma and successfully deprived the House of a quorum. Texas Governor Rick Perry called a special session, which began in June 2003. During that first special session, a blocker bill was once again placed atop the Senate calendar, as is the usual practice. During that first special session, eleven Senators, including nearly all the Appellants here, announced that they would not vote to suspend the rules to allow a

congressional redistricting bill to be taken up by the Texas Senate. Because a two-thirds supermajority vote was needed to suspend the rules of the Senate, congressional redistricting legislation died with the announcement. The supermajority requirement that had been utilized as a tradition in the Texas Senate once again served to block consideration of congressional redistricting legislation.

In the summer of 2003, however, Texas Governor Rick Perry called a second special session and Lieutenant Governor Dewhurst, the presiding officer of the Senate, announced that in the second special session, the supermajority procedure would be abandoned and that there would not be a blocker bill placed atop the Senate calendar. App. 15a. The decision to abandon the two-thirds rule was not broad-based; it specifically targeted only the rules governing the process for enacting *congressional redistricting* legislation.[3] App. 16a.

Appellants protested the State's decision to abandon the longstanding practice of require a supermajority prior to considering redistricting legislation by leaving the State of Texas in order to deprive the Senate of a quorum (which requires the presence of two-thirds of the senators). There they remained until the second special session ended.

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[3] Texas is among a distinct minority of states that has chosen to control its legislators' activities with rules requiring supermajorities. It takes two-thirds to form a legislative quorum. TEX. CONST. ART. III, § 10. It takes two-thirds to expel a member of the legislature. TEX. CONST. ART. III, § 11. It takes two-thirds to make a bill effective sooner than ninety days after adjournment of the session in which it is enacted. TEX. CONST. ART. III, § 39. It takes two-thirds to override a gubernatorial veto. TEX. CONST. ART. IV, § 14. And it takes four-fifths to suspend the rules requiring bills to be read on three separate days before passage. TEX. CONST. ART. III, § 32.

Eventually, however, a third session was called, a quorum was established, and congressional redistricting legislation was enacted using the simple majority procedure challenged here.

Approximately two months before that final vote occurred, appellants brought this action to enforce Section 5 of the Voting Rights Act, arguing that preclearance is required of a change in Senate procedures intended to make it possible for the Senate to enact a new redistricting plan.[4] Citing only *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), the three-judge court below denied plaintiffs a Section 5 injunction and dismissed plaintiffs' Section 5 claims. The Court made no factual findings in its decision, ruling instead as a matter of law that the decision in *Presley* foreclosed any relief.

The appellants also challenged the abolition of the supermajority requirement under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and under the Fourteenth and Fifteenth Amendments to the United States Constitution, in the event either preclearance was not required of the change or if preclearance was required and obtained. The three-judge court dismissed those claims without affording appellants an evidentiary hearing.[5]

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[4] During the pendency of this case, the State, while preserving its argument that Section 5 did not apply, submitted the change at issue to the Justice Department for preclearance. The Justice Department responded that it did not consider the elimination of the two-thirds rule to be a covered change. So the change was never in fact precleared as non-retrogressive.

[5] Appellants believe the three-judge court's ruling dismissing their Section 2 and consitutional claims without even affording appellants the

THE QUESTIONS ARE SUBSTANTIAL

The three-judge district court's decision is contrary to decisions of this Court that have reversed three-judge courts that have attempted to carve out unwarranted exceptions to Section 5. The district court held that the change from a supermajority to simple majority practice or procedure was exempt from Section 5 preclearance requirements because it did not affect voters. It reasoned that "the process" by which a redistricting plan is enacted can never have the requisite effect on voting. As we show below, such a decision not only is inconsistent with this Court's Section 5 precedents but also "open[s] a loophole in the statute the size of a mountain[.]" *Morse v. Republican Party of Va.*, 517 U.S. 186, 235 (1996) (Breyer, J., concurring).

This Court has rendered numerous decisions over the last four decades on the scope of Section 5 coverage. *See, e.g., Young v. Fordice*, 520 U.S. 273 (1997) (voter registration system changes to comply with National Voter Registration Act (NVRA)); *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996) (political party convention fees); *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985) (change in candidate qualifying period); *City of Lockhart v. United States*, 460 U.S. 125 (1983) (numbered posts and staggered terms); *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 42 (1978) (personnel rules affecting school district employees who desire to run for office); *Georgia v. United States*, 411 U.S. 526, 534 (1973) (redistricting plans); *Perkins v. Matthews*, 400 U.S. 379, 383-85 (1971) (annexations); and *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (district to at-large voting

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right to an evidentiary hearing is so plainly wrong as a matter of law as to require summary reversal.

and change from elected school superintendent to appointed). In every case, with the exception of *Presley*, the Court has ruled in favor of coverage. This case should not become a second exception.

To the contrary, this case bears no resemblance to *Presley*, where the argument was that a change in the duties and authority of elected road commissioners affected the interests of those who had previously voted for them. This Court held that such a tangential link to voting – which would arise with every action affecting the power of any elected official – was outside the scope of Section 5. Here, however, the argument was that the change in Senate procedures would affect, *not* the voters who previously elected the Senate (as argued in *Presley*) but the voters who would be electing members of Congress in the future under a districting plan that was the intended and direct result of the abandonment of the two-thirds rule.

It should not be surprising that such a change in legislative procedures solely applicable to redistricting would need to be precleared. In fact, the uncontradicted record below demonstrated that numerous Section 5 covered jurisdictions over the years have routinely submitted for preclearance comparable changes in redistricting procedures. That only makes sense, given the well-established rule that redistricting plans themselves must be precleared and the reality, illustrated by this case, that changes in the procedures for adopting such plans can have huge consequences. *See* Exhibit 30, a 67-page computer printout from the Department of Justice listing redistricting procedures

submitted for preclearance by state and local governments from 1980-2003).[6]

I. THE DISTRICT COURT ERRED IN ITS INTERPRETATION OF *PRESLEY V. ETOWAH COUNTY COMM'N.*

Although the court below found that this Court's decision in *Presley v. Etowah County Commission*, 502 U.S. 491 (1992) "controls this case", the decision in *Presley*, is so utterly different as to be easily distinguishable. In *Presley*, plaintiffs challenged two resolutions of a county commission. One resolution transferred road supervision authority from the county commissioners to the county engineer. The other resolution transferred authority over road repairs from individual commissioners to the entire county commission. These resolutions were challenged under Section 5 of the Voting Rights Act on the theory that they diminished the authority of individual road commissioners and thus affected the nature of the elective office and the voters who had elected that official. This Court rejected that argument, holding that such changes did not have to undergo Section 5 preclearance because they had no connection to voting. The Court said: the change

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[6] The DOJ computer printout is in two parts, with Part 1 those changes from 1980 to 1991 and Part 2 from 1992 to 2003. The printout was attached as Exhibit B to Plaintiffs' Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss. It lists hundreds of changes in redistricting practices and procedures that have been submitted to DOJ for preclearance over the last two decades. These changes include the elimination of a requirement that a redistricting ordinance be read on 3 separate days (page 18 in part 1), a change in redistricting criteria adopted by the State of Alabama (page 2 in part 1), and a limitation on the frequency with which city councils in South Carolina may adopt redistricing plans (page 35 in part 2).

"concerns only the internal operations of an elected body and the distribution of power among officials, and, thus, has no direct relation to, or impact on, voting." *Presley*, 502 U.S. at 492.

This case bears no resemblance to *Presley*. The argument here is that the Senate made an exception to its usual practices in enacting legislation, that that change greatly altered the ability of a 1/3 minority to affect the course of events, *and that the change was made applicable only to congressional redistricting*. The intent and effect was to break a log-jam in the Texas Senate on that issue, allowing the majority to pass a new map that would never win bipartisan support. The abandonment of the supermajority (2/3) Rule thus directly impacted voters and the redistricting practices and procedures in Texas.

The Court's decision in *Presley* did not undo the longstanding Section 5 principles that plainly would bring this change within the scope of those changes requiring preclearance. Its holding relating to internal governance changes concerning how county road funds are to be administered is not a conclusion banishing all internal governance changes from Section 5's purview. Just because *Presley* held one type of internal change to be outside Section 5 does not mean that it can be extended to exempt *all* types of internal governance changes from Section 5's requirements. *Presley* addressed and set an outer limit for Section 5. It did not overturn any earlier decisions establishing what clearly fell within that outer limit.

No matter how closely or how broadly *Presley* is read, it cannot in any way be read to hold that a change as directly linked to voting – through both logic and reality – as the one at issue here is outside Section 5's reach. *That* reading of

Presley would be at odds with this Court's direction since inception of the Voting Rights Act that "§ 5 is to be given broad scope." *NAACP v. Hampton County Election Comm'n*, 470 U.S. at 176. It would also exempt from Section 5 scrutiny changes only applicable to redistricting that are aimed at making minority voters worse off than they were before, the essence of what Section 5 is designed to prevent. *See Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003).

The three-judge court below held that *Presley* barred relief here because the events that gave rise to this case "affect the distribution of power between legislators of two different parties." App. 2a. But allocations of political power are subject to Section 5 as this Court held in *Foreman v. Dallas County*, 521 U.S. 979 (1997) (per curiam). In *Foreman, supra*, "a three-judge court held that preclearance was not required because the county was simply exercising, under the state statute, its "discretion to adjust [the procedure for appointing election] judges according to party power." 521 U.S. at 980 (alteration in original) The three-judge court in *Foreman*, this Court found, "had apparently concluded that this 'discretionary' use of political power meant that the various methods for selecting election judges were not covered changes under § 5." *Id.* The Court held that the lower court's decision was inconsistent with this Court's Section 5 precedents. "The fact that the county's new procedures used political party affiliation as the selection criterion does not mean that the methods were exempt from preclearance." *Id.* at 981.

Foreman was decided after *Presley* and thus makes clear that *Presley* did not carve out any Section 5 exceptions merely because a State or political subdivision altered some voting or election procedure "according to [political] power." 521 U.S. at 980. Similarly, the three-judge court's

decision in this case that Section 5 preclearance was not required because the abolition of the supermajority practice or procedure only "affect[ed] the distribution of power between legislators of two different political parties" is unwarranted.

II. A CHANGE IN THE CONSISTENTLY APPLIED PRACTICE OR PROCEDURE FROM A SUPERMAJORITY RULE TO A SIMPLE A MAJORITY PROCEDURE IN THE TEXAS SENATE — APPLICABLE ONLY TO CONGRESSIONAL REDISTRICTING — REQUIRES SECTION 5 PRECLEARANCE

The question here is whether the change in procedures from using supermajority rules to ones using only a simple majority, targeted solely to congressional redistricting legislation, is subject to the preclearance requirements of the Voting Rights Act. To see why it is, it is helpful to shift from a focus on informal, internal rules of the legislative body. Instead, consider an analogous action taken through formal constitutional or legislative amendment. Assume, for example, that the legislature, at the Lieutenant Governor's urging, approved the holding of a statewide referendum on whether to amend Article III, § 10, of the Texas Constitution[7] by adding the following as an exception after the opening phrase "Two-thirds of each House shall constitute a quorum to do business . . .": *except in consideration of legislation concerning congressional redistricting, in which case a*

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[7] It now reads: "Two-thirds of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each House may provide." TEX. CONST. ART. III, § 10.

simple majority shall constitute a quorum to do business. Were the people of Texas to add that new provision to the Texas Constitution, it seems clear that the new constitutional rule would be a change in state procedures affecting voting that could not be implemented until the State had obtained Section 5 preclearance under the Voting Rights Act.

Or consider another hypothetical situation, admittedly outlandish in this day and time but not too far from the core concerns animating the Voting Rights Act when it first was passed in 1965. Assume the legislature were to enact a statute providing that, on votes concerning congressional redistricting legislation, the votes of minority members of the Texas Senate shall not be counted if counting them would block passage of the bill by two-thirds of the legislature. Surely Section 5 would bar implementation of such a statute – whose practical effect would be intended, among other things, to hasten the effective date of state legislation – pending preclearance.[8]

In Texas, redistricting is not just a simple one-time act that takes place when a bill is passed in the Legislature. Rather, the State has made the decision that it will involve a process that shapes the bill and determines how the lines will ultimately be drawn. Changes to that redistricting process, such as whether minorities and their elected representatives in the Texas Senate can force compromise or consensus on a redistricting bill—as the supermajority rule is intended to allow—are a potent procedural weapon. That the redistricting plan itself will ultimately be subject to Section 5

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[8] The broader constitutional defects in such a statute under the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment would not even have to be reached in light of the statutory protection afforded by Section 5.

preclearance is some protection, to be sure. But a plan may be unobjectionable under the Voting Rights Act and nonetheless impact voters in ways they would like to avoid or change, such as dividing their communities of interest or placing their community in a different congressional district. The process of redistricting allows them to pursue such changes and thus the process by which redistricting plans are enacted should not be exempt from Section 5.

Redistricting is a process by which state officials alter voting constituencies and impact the voters' ability to elect candidates of their choice to office. The redistricting process involves voting because it inevitably affects the ability of voters to cast ballots, as well as the opportunity for them and their elected representative to express their views on the configuration of the districts. *See Georgia v. United States*, 411 U.S. 526 (1973). Where a redistricting practice or procedure has been in place for many years, changes to it directly impact voters' abilities to affect the congressional districts in any redistricting plan that is being considered or which may eventually pass the Senate. And a procedural protection of a supermajority practice or procedure is vitally important to maintaining the integrity of the redistricting process and insuring that minorities (racial or political) can protect their interests and play an effective role in the political process. Ultimately, changes to redistricting practices and procedures, occasioned here by the change from the supermajority (2/3) practice to a simple majority, affect voters' ability to shape the contours of any new map, and their ability to participate effectively in the political process.

In addition, changes in redistricting procedures affect officeholders' abilities to effectuate changes in voting

constituencies, which in turn can affect the ability of candidates to become or remain holders of elective office. *See Dougherty County Board of Education v. White*, 439 U.S. 32 (1978) (requiring preclearance of change in absenteeism policy that forced employees to take unpaid leave if they ran for office); *see also* 28 C.F.R. § 51.13(g) (Regulations of the United States Department of Justice Under Section 5 of the Voting Rights Act listing the ability to become or remain holders of elective office as examples of covered changes). Because sponsors of redistricting legislation in the Texas House and Senate in 2003 made clear that the aim of their redistricting legislation was to replace Democratic officeholders with Republicans, changes in redistricting procedures will have a profound effect on the ability of candidates "to become or remain holders of elective office" and will thus affect voters' choices.

The Voting Rights Act defines "vote" and "voting" to include "all action necessary to make a vote effective." 42 U.S.C. § 1973*l*(c)(1). The plain language of the statute makes the preclearance requirements applicable to any change with respect to voting, no matter how small or minor. *See Allen*, 393 U.S. at 566-68 ("It is significant that Congress chose not to include even . . . minor exceptions to § 5, thus indicating an intention that all changes, no matter how small, be subjected to § 5 scrutiny."). The language "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" (42 U.S.C. § 1973c) includes all procedural rules affecting the casting of a ballot. *Allen*, 393 U.S. at 565-67.

The changes in the practices and procedures followed by the Texas Senate aimed specifically and solely at congressional redistricting legislation will affect voters and thus fall within the scope of Section 5.

III. THAT THE *FORM* OF THE VOTING CHANGE AT ISSUE HERE IS ONE INVOLVING AN INTERNAL RULE, RATHER THAN FORMAL LEGISLATION, IS LEGALLY IRRELEVANT.

The fact that the change at issue here involved internal Senate rules rather than publicly debated and adopted legislation or constitutional amendment does not affect the Section 5 analysis. "[T]he form of a change in voting procedure cannot determine whether it is within the scope of § 5." *NAACP v. Hampton County Election Comm'n*, 470 U.S. at 178. *Any* change "reflecting the policy choices of the elected representatives of the people" is subject to Section 5's requirements. *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981). Just as rules and decisions of the judicial branch are not beyond Section 5's reach, *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.16 (1982), neither are the internal rules of the Senate when they affect voting. Changes that "affect even a single election" are covered. *NAACP v. Hampton County Election Comm'n*, 470 U.S. at 178.

The backdrop for these rules on Section 5's reach is Congress's intention to reach the "protean strategies of racial discrimination." *Dougherty County Board of Education v. White*, 439 U.S. 32, 37 n.6 (1978). *Dougherty* even extended Section 5 to require preclearance of a local government's change in leave policy for employees wishing to run for public office. This and similar decisions make it clear that realism, not formalism, is to govern interpretation of Section 5. "Section 5 is not concerned with a simple inventory of voting procedures, but rather with *the reality of changed practices* as they affect" minority voters. *Georgia v. United States*, 411 U.S. 526, 531 (1973) (emphasis added).

The reality of the Senate rule change at issue here is plain. Its sole intention, and its only effect, is enactment of a congressional redistricting plan disfavored by those targeted by the rule change. Effectuation of the rule change is tantamount to a direction that a new, judicially unforced, mid-decade congressional redistricting plan be passed in Texas. Treatment of such a change cannot be artificially segregated from its consequences – which are indisputably covered by Section. 5.[9]

In *NAACP v. Hampton County Election Commission*, the Court rejected this kind of artificial separation, holding that a change in candidate filing periods is covered by Section 5, and explaining that "a filing period cannot be considered in isolation from the election of which it forms a part." 470 U.S. at 177. Here, there is a direct link between the targeted suspension of the two-thirds rule and "the election of which it forms a part."

This Court has indicated that one measure of whether a matter is covered by Section 5 is the "actual practice" of the covered states. *Georgia v. United States*, 411 U.S. at 533. Attached as Exhibit B is a lengthy print-out of Section 5 submissions to the Department of Justice, depicting the longstanding and extensively honored practice of submitting for Section 5 preclearance changes in procedures related to redistricting matters, a number of which involved changes to internal governance rules.

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[9] *See Georgia v. United States*, 411 U.S. 526 (1973) (congressional redistricting legislation subject to Section 5).

CONCLUSION

This Court should summarily reverse the decision of the district court. Alternatively, this Court should note probable jurisdiction.

Respectfully submitted.

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APPENDICES

Appendix A

United States District Court,
S.D. Texas, Laredo Division.

Gonzalo BARRIENTOS, et al., Plaintiffs,
v.
STATE of Texas, et al., Defendants.

No. Civ.A. L-03-113.

Sept. 12, 2003.

MEMORANDUM AND ORDER

This action was brought by eleven Texas State Senators against: the State of Texas, its Governor, and Lieutenant Governor, seeking declaratory and injunctive relief under §§ 2 and 5 of the Voting Rights Act ("the Act"). The complaint primarily attacks two events: first, the decision by the state legislature to consider congressional redistricting legislation this year, notwithstanding that a redistricting plan has already been implemented this decade; second, the declaration by the Lieutenant Governor that redistricting legislation would be considered in a special session without adhering to the so-called "2/3rd Rule." Plaintiffs allege that these two events constitute changes affecting voting within the meaning of the Act and, therefore, are legally unenforceable because preclearance has not been obtained.

Defendants have filed a motion to dismiss, arguing that the Act does not apply to either of the challenged events. We agree.

The United States Supreme Court decision in *Presley v. Etowah County Commission, et al.*, 502 U.S. 491, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992), controls this case. *Presley* makes clear that, while the reach of the Act is broad, it is nevertheless still "an extraordinary departure from the traditional course of relations between the States and the Federal Government," *id.* at 827, and that its reach is limited to procedures that have "a direct relation to voting and the election process." *id.* at 829. Thus, the Act is concerned with changes affecting procedures for casting ballots, candidacy requirements and qualifications, and composition of the electorate. *Id.* at 828. *Presley* distinguished between changes directly affecting voting by the electorate and "changes in the routine organization and functioning of government." *Id.* at 829. While the latter may indirectly affect voting, they are not within the scope of the Act.

We readily acknowledge, as did the Supreme Court, that "in a real sense every decision taken by government implicates voting," which is "but the felicitous consequence of democracy, in which power derives from the people." *Presley,* 112 S.Ct. at 829. Nevertheless, the Supreme Court insisted that a line must be drawn between events which directly affect the voters and events which, as here, affect the distribution of power between legislators of two different political parties. In the instant case, what will directly affect the voters of this State is a redistricting bill, not the mere consideration of such a bill or the process by which it comes to the floor of the Texas Senate. The Department of Justice has also concluded that the consideration by the Texas legislature of a redistricting bill without applying the "2/3rd

Rule" is not a change affecting voting within the contemplation of the Act. This conclusion, while not binding upon us, is entitled to "considerable deference." *Id.* at 831.

It is undisputed that any new redistricting bill would have a direct relation to voting. Accordingly, it would have to be precleared under the Act and would thereafter be subject to judicial challenge. However, that time has not yet come.

The motion to dismiss claims under the Voting Rights Act is GRANTED. We also DISMISS claims under *42 U.S.C. § 1983*, insofar as Plaintiffs claim that the State's decision to consider redistricting legislation and the failure to adhere to the "2/3rd Rule" violate the First, Fourteenth and Fifteenth Amendments to the United States Constitution.

We have promptly issued this brief opinion because of our understanding that another special session of the Texas legislature is imminent. We reserve the opportunity to issue a more detailed opinion hereafter, if appropriate. We also withhold ruling on Plaintiffs' motion to file a first amended complaint. The purpose of the amendment is to add a Count V, complaining of threats to arrest the Plaintiffs and also to require that they pay a monetary sanction for their failure to appear at earlier special sessions. As discussed at the hearing on September 11, 2003, the arrest issue likely will become moot. Indeed, the Plaintiffs' fear of being coerced to appear at a legislative session is shifting to a fear of being prevented from appearing. For reasons discussed at the hearing, neither the facts nor the law on the issue of threatened monetary sanctions are sufficiently developed at this point to permit an informed decision. Moreover, it is possible that future developments could also moot this issue.

DONE this 12th day of September, 2003

U.S. Circuit Judge Patrick E. Higginbotham
Chief U.S. District Judge George P. Kazen
U.S. District Judge Lee H. Rosenthal

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

GONZALO BARRIENTOS,)
RODNEY ELLIS, MARIO GALLEGOS, JR.,)
JUAN "CHUY" HINOJOSA, EDDIE LUCIO, JR.,)
FRANK L. MADLA, ELIOT SHAPLEIGH,)
LETICIA VAN DE PUTTE, ROYCE WEST,)
JOHN WHITMIRE, and JUDITH ZAFFIRINI,)
)
Plaintiffs,)
)
v.)
)
STATE OF TEXAS,)
RICK PERRY, In His Official Capacity)
As Governor of the State of Texas;)
DAVID DEWHURST, In His Official Capacity)
As Lieutenant Governor and Presiding Officer)
Of the Texas Senate,)
)
Defendants.)

September, 22, 2003

NOTICE OF APPEAL

Plaintiffs Gonzalo Barrientos, Rodney Ellis, Mario Gallegos, Juan "Chuy" Hinojosa, Eddie Lucio, Frank Madla, Eliot Shapleigh, Leticia Van de Putte, Royce West, John Whitmire, and Judith Zaffirini hereby appeal to the United States Supreme Court this Court's September 12, 2003, Memorandum and Order.

Respectfully submitted,

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Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

GONZALO BARRIENTOS,
RODNEY ELLIS, MARIO GALLEGOS, JR.,
JUAN "CHUY" HINOJOSA, EDDIE LUCIO, JR.,
FRANK L. MADLA, ELIOT SHAPLEIGH,
LETICIA VAN DE PUTTE, ROYCE WEST,
JOHN WHITMIRE, and JUDITH ZAFFIRINI,

Plaintiffs,

v.

STATE OF TEXAS,
RICK PERRY, In His Official Capacity
As Governor Of The State of Texas; and
DAVID DEWHURST, In His Official Capacity
As Lieutenant Governor and Presiding Officer
Of the Texas Senate,

Defendants.

August 11, 2003

COMPLAINT

Plaintiffs allege that:

1. This action is brought pursuant to Sections 2, 5 and 12(d) of the Voting Rights Act of 1965, as amended,

42 U.S.C. §1973, 42 U.S.C. §1973c, 42 U.S.C. §1973j(d), and pursuant to 42 U.S.C. §1983, to enforce rights guaranteed by the United States Constitution.

2. This Court has jurisdiction of this action pursuant to 28 U.S.C. §§1331, 1343, 1344, 2201, and 2202. This Court also has jurisdiction pursuant to 42 U.S.C. §§1973c, 1973j(d), and 1973j(f).

3. Plaintiffs are duly elected members of the Texas Senate. Plaintiff Barrientos is Hispanic and resides in Travis County. Plaintiff Ellis is African-American. Plaintiff Gallegos is Hispanic. Plaintiff Whitmire is Anglo. Plaintiffs Ellis, Gallegos and Whitmire reside in Harris County. Plaintiff Hinojosa is Hispanic and resides in Hidalgo County. Plaintiff Lucio is Hispanic and resides in Cameron County. Plaintiffs Madla and Van de Putte are Hispanic and reside in Bexar County. Plaintiff Shapleigh is Anglo and resides in El Paso County. Plaintiff West is African-American and resides in Dallas County. Plaintiff Zaffirini is Hispanic and resides in Webb County. Plaintiffs bring this case as individual voters and in their official capacities as duly elected members of the Texas State Senate.

4. Plaintiffs represent the eleven state senate districts in Texas with the highest number of minority voters of any of the 31 state senate districts. Ten of the eleven state senate districts represented by plaintiffs are majority-minority in total population, and the eleventh, represented by Senator Barrientos, is approximately 45% minority in total population.

5. The defendant State of Texas is a state of the United States of America.

6. The defendant State of Texas is subject to the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

7. Defendant Governor Rick Perry is the duly elected Governor of the State of Texas and the chief executive officer of the State. Defendant Perry is sued in his official capacity.

8. Defendant David Dewhurst is the duly elected Lieutenant Governor of the State of Texas and is the presiding officer of the Texas Senate. Defendant Dewhurst is sued in his official capacity.

9. Section 5 of the Voting Rights Act provides that any "voting qualification, or prerequisite to voting, or standard, practice or procedure with respect to voting" different from that in force or effect in the State of Texas, on November 1, 1972, may not be lawfully implemented unless the State of Texas obtains a declaratory judgment from the United States District Court for the District of Columbia that the change affecting voting does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, except that the change may be implemented without such judgment if it has been submitted to the Attorney General of the United States and no objection has been interposed by the Attorney General within sixty days. See 42 U.S.C. §1973c.

10. The defendants have authority under Texas law to enact or administer "voting qualifications, or prerequisites to voting, or standards, practices or procedures

with respect to voting," (42 U.S.C. §1973c) different from those in force or effect on November 1, 1972.

FACTS

Procedural History

11. Since November 1, 1972, the coverage date of the special provisions of the Voting Rights Act, the State of Texas has gone through three congressional redistricting cycles following the release of the decennial census.

12. In the redistricting cycles following release of the 1980 and 1990 census, the State of Texas followed certain practices and procedures with respect to enacting a new congressional map. In the post-1980 and post-1990 cycles, for example, the State of Texas declined to exercise its discretion to undertake congressional redistricting once a valid congressional map was implemented that met all legal requirements. Indeed, in 1996, a federal court struck down Texas' congressional map, imposed a map of its own, and ordered the Texas Legislature to enact a new map in the 1997 legislative session. Even in those circumstances, the Texas Legislature declined to exercise its discretion to redistrict and the court-ordered plan remained in effect for the 1998 and 2000 elections.

13. In the 1981, and 1991, and 2001 redistricting cycles, the State of Texas conducted numerous public hearings across the State to give voters and other members of the general public an opportunity to participate in the political process that would lead to the formation of new voting constituencies as a result of redistricting. In connection with the 2001 cycle, for example, the full

redistricting committees of the Texas House and the Texas Senate conducted public field hearings on redistricting jointly in the following cities: Abilene, Arlington, Austin, Dallas, El Paso, Tyler, Houston, Harlegen, Midland, Houston, and San Antonio.

14. Prior to 2003, the redistricting process followed by the State of Texas involved the full Redistricting Committees of the House and Senate conducting joint field hearings across the State. The redistricting practices and procedures used to conduct redistricting hearings in the State of Texas prior to 2003, by having all Members of the Senate and House Redistricting Committee to conduct hearings together, permitted each and every member of the House and Senate redistricting committees to hear all of the testimony from all of the witnesses. The process of conducting joint hearings also permitted all members of the House redistricting committee to hear the testimony presented to the Senate redistricting committee and vice versa.

15. In its 2001 regular session, the Texas Legislature failed to enact a congressional redistricting map. In July 2001, the Governor of Texas announced that he would not call a special session of the Legislature because to do so would be a waste of taxpayer dollars. He further announced that as a result of his decision, the issue of congressional redistricting would be resolved by the courts and not by the Legislature.

16. In November 2001, a three-judge federal court imposed a congressional plan for the State of Texas. *Balderas v. State of Texas*, No. 6:01CV158 (E.D. Tex., November 14, 2001). The three-judge court's plan was not an interim one, imposed for the 2002 elections only. Instead,

the three-judge court stated that the map being imposed would be "*the* remedial congressional redistricting plan for the State of Texas." *Id.* (emphasis added). The judgment imposing a court-drawn map in *Balderas* neither ordered the State of Texas to enact a new congressional map nor did it encourage the State legislature to do so.

17. Although the *Balderas* plaintiffs appealed the decision of the three-judge court to the United States Supreme Court, the State of Texas did not appeal. Instead, the State of Texas filed a motion to dismiss or affirm the three-judge court's decision. On June 17, 2002, the United States Supreme Court summarily affirmed the decision of the three-judge court. See *Balderas v. State of Texas*, 536 U.S. 919 (2002). The three-judge court's congressional map governed the 2002 elections. There has been no finding or determination that the *Balderas* three-judge court's map is unconstitutional or unlawful in any way. Nor have any census data been released which show the districts ordered into effect by the three-judge court in *Balderas* to be malapportioned. Indeed, the Texas Attorney General has opined that the State of Texas need not redistrict its congressional districts at this time, and that the *Balderas* map could remain in effect for the entire decade. See Texas Attorney General Opinion No. GA-0063 April 23, 2003.

The 2003 Redistricting Efforts

18. During the 2003 regular session of the Texas Legislature, the Texas House proceeded with an effort to enact a new congressional map, but the Texas Senate did not take up the issue. The efforts of the Texas House were thwarted, however, when certain members of the Texas House broke quorum, precluding the House from taking up

the congressional redistricting bill in the regular session. The 2003 regular session, therefore, ended without any congressional redistricting bill being passed.

19. On June 18, 2003, Texas Governor Rick Perry announced that a special session of the Texas Legislature would be convened for the purpose of enacting a new congressional map. The House promptly proceeded to enact a new congressional map. However, the Texas Senate attempted, but failed, to pass a new congressional map in the special session because of a long-standing practice of the Texas Senate that requires a 2/3 majority of those in the Senate to agree to take up a congressional redistricting bill (hereafter the "2/3 Rule").[1]

20. The State of Texas' decision to undertake congressional redistricting in 2003, despite the fact that it is operating under a legal plan ordered into effect for the decade by a three-judge federal court and affirmed on direct appeal by the United States Supreme Court, is unprecedented.

21. Moreover, the manner in which the State has proceeded with its redistricting efforts in 2003 substantially

---

[1] In the Senate, a 2/3 vote is ordinarily necessary to take up a bill out of order. Consequently, it has been the practice in the Texas Senate for a Member to file a bill, known as "a blocker bill", as the first piece of legislation in the session. The presence of a blocker bill has the effect of requiring 2/3 of the Senate to vote to take up a bill out of order and to consider it ahead of the blocker bill. In the 31 Member Senate, eleven Senators can effectively prevent a bill from reaching the floor as a result of the 2/3 Rule. On July 14, 2003, Republican Senator Bill Ratliff announced that he would join with at least 10 other Democrats to prevent congressional redistricting from reaching the Senate floor. See Exhibit 12, hereto.

departs from the normal procedural sequence it has followed historically. For instance, the Senate and House have failed to conduct *joint* redistricting hearings as had occurred in prior redistricting cycles. Instead, the House and Senate each conducted separate field hearings. Thus, the testimony of hundreds of witnesses who attended and testified at the House field hearings was never heard or considered by the Senate members, and the testimony of hundreds of witnesses who attended the Senate hearings was not heard or considered by House members.

22. The number of hearings, the location of the hearings and the organization of the hearings has also been a substantial departure from prior redistricting efforts. For instance, the House Redistricting Committee refused to approve a motion made to conduct field hearings during the regular session. House Redistricting Committee Chairman Joe Crabb also questioned the value of holding public field hearings on redistricting in South Texas where most persons spoke Spanish, stating that since only a few Committee members spoke Spanish, most members of the Committee would be unable to understand what non-English speaking witnesses would be saying. Moreover, although the full fifteen-member House Redistricting Committee included two African American members and four Hispanics, not a single subcommittee was chaired by a minority group representative. In addition, the Committee failed to conduct any official field hearings in the Rio Grande Valley or in any city south of San Antonio. While the Committee attempted to hold an "unofficial" subcommittee hearing in Brownsville, those in attendance, primarily Hispanics, would not allow the meeting to proceed because the subcommittee lacked a quorum and the citizens there demanded an official hearing.

23. In addition to no longer holding joint hearings with the House, the Senate failed to conduct any field hearings in either far West Texas or East Texas. Thus, the Senate held no redistricting field hearings in El Paso or Tyler, two cities where the Senate had traveled to conduct redistricting field hearings in 2000.

24. Finally, the testimony of the public was largely ignored. In the House field hearings, for example, 96.5% of the 3103 persons who attended those hearings registered an opinion against the Texas Legislature undertaking any redistricting. On the Senate side, 92.1% of the 2982 the persons who registered a position on redistricting registered an opinion against redistricting. Over 6000 Texans attended these hearings in June and July of 2003. In spite of this widespread and overwhelming opposition to the State of Texas taking up congressional redistricting, the House and Senate Committees each proceeded to undertake redistricting anyway and passed new congressional maps. However, as noted above, congressional redistricting legislation never reached the full Senate because a third of the Senators invoked the Senate's traditional 2/3 Rule. See page 6, note 1, *supra.*

The 2003 Second Special Session

25. Governor Rick Perry has now issued a proclamation calling a second special session for the purpose of considering congressional redistricting. Lieutenant Governor Dewhurst publicly announced that in the second special session, the extraordinary majority practice or procedure known as the 2/3 Rule, a long-standing practice of the Texas Senate that empowers the chamber's minority by requiring a 2/3 vote to open debate, will not be in effect. The

defendants' decision to abandon the 2/3 Rule only applies to congressional redistricting legislation in the second called special session, and not to any other pieces of legislation that might come before the Senate.

26. There are 31 members of the Texas Senate; twelve Democrats (of which nine are minority) and nineteen Republicans (of which none are minority). If the 2/3 Rule is in place, any 11 members of the Texas Senate (35%) can join together and block a redistricting bill from being considered. The eleven plaintiffs-Senators who have brought this action wish to avail themselves of the protections of the 2/3 Rule, which has been available to other Senators in prior sessions when congressional redistricting legislation was considered.

27. The 2/3 Rule is a traditional practice or procedure of the Texas Senate that protects a minority group: racial, political or otherwise. There are nine minority group members of the Texas Senate, and all nine are Democrats. These nine Senators are among the eleven plaintiffs who have brought this action, and they have stated publicly that they are opposed to congressional redistricting being considered by the Texas Senate. The other two plaintiffs-Senators (Shapleigh and Whitmire) are Anglo Democrats who also represent majority-minority districts. These eleven plaintiffs have left the State and their absence has deprived the Texas Senate of a quorum. These 11 Senators have executed sworn Declarations stating that their constituents' interests will be harmed if the protections of the 2/3 Rule are not available in any special sessions in 2003 or 2004. See Exhibits 1-11 hereto. These 11 Senators have also stated that the defendants' decision to abandon the 2/3 Rule is intended to have, and will in fact have, a discriminatory result on

minority voters and officeholders on account of their race, color, or membership in a language minority group. *Ibid.*

28. If these eleven Senators could avail themselves of the protections afforded by the 2/3 Rule, minority voters and their elected Senators would be able to use the practice or procedure that other Anglo Senators have had the opportunity to use in the past to protect them and their constituents from the harmful effects of a new congressional plan. If the traditional practice or procedure of using the supermajority (2/3) Rule protections is in place, a simple majority of Senators would be insufficient to bring up congressional redistricting legislation. Changing or abandoning the traditional practice or procedure of a supermajority (2/3) Rule will mean that these Senators do not have the protection of a practice or procedure used in the past by Anglo Senators to require consensus, compromise and negotiation in considering any congressional redistricting legislation. Changing or abandoning the supermajority (2/3) Rule will render ineffective the representation that these Senators can provide to their constituents on congressional redistricting legislation.

29. In prior sessions the Texas Legislature has considered congressional redistricting in nine regular and special sessions since 1971: the 1971 regular session; the 1981 regular session; the 1981 special session; the 1991 regular session; the 1991 special session; the 1997 regular session; the 2001 regular session; the 2003 regular session; and the first 2003 special session. In all but one of these instances (1981), a supermajority rule has been utilized and respected whenever the Texas Senate has considered congressional redistricting. The decision to do away with a 2/3 Rule in 2003 will harm minority voters and the ability of

their elected representatives to protect their voting rights in the congressional redistricting process. As a result of the State's decision to abandon its traditional practices and procedures of having a supermajority 2/3 Rule for congressional redistricting, the nine black and Hispanic plaintiffs-Senators, as well as their constituents, are being deprived of the protections that the 2/3 Rule has afforded other legislators in prior sessions when congressional redistricting was being considered. As a result of the State's decision to abandon its traditional practices and procedures of having a supermajority 2/3 Rule for congressional redistricting, the minority voters in the two majority-minority state senate districts represented by Anglo Senators Shapleigh and Whitmore, also will be deprived of the protections that the 2/3 Rule has afforded other Senators in prior sessions when congressional redistricting was being considered.

COUNT I

30. By changing its redistricting practices and procedures, and no longer permitting members of the Texas Senate to avail themselves of the protections afforded by the 2/3 Rule, the defendants are seeking to enact or administer a new voting "standard, practice or procedure" within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

31. Changes in redistricting practices or procedures, such as the abandonment of a supermajority requirement as a prerequisite to considering congressional redistricting legislation, are subject to the preclearance requirements of Section 5. Such changes directly impact voters' abilities to affect the congressional districts in any

redistricting plan that is considered or which may eventually pass the Senate. Changes in redistricting procedures thus effectuate changes in voting constituencies, which in turn can affect the ability of candidates "to become or remain holders of elective office." 28 C.F.R. 51.13(g)(Regulations of the United States Department of Justice Under Section 5 of the Voting Rights Act Listing Examples of Covered Changes). Because sponsors of redistricting legislation in the Texas House and Senate in 2003 have made clear that the aim of their redistricting legislation is to replace Democratic officeholders with Republicans, changes in redistricting procedures will have a profound effect on the ability of candidates "to become or remain holders of elective office."

32. The changes in redistricting procedures here, the unprecedented mid-decade redistricting when a legally valid map is in place, as well as the abandonment of the supermajority (2/3) Rule, will also bear on the ability of the 11 plaintiffs-Senators and the voters in their districts to participate effectively in the political process. Changes that affect the ability of voters to participate effectively in the political process are subject to Section 5. See *Morse v. Republican Party of Virginia,* 517 U.S. 186, (1996), 116 S. Ct. 1186, 1200-1201.

33. By the unprecedented use of special sessions to redistrict in the absence of (A) new census data showing blatant violations of one-person, one-vote in the current plan, or (B) any court order finding the current plan is either unconstitutional or illegal, the defendants are seeking to enact or administer a new voting "standard, practice or procedure" within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

34. The defendants have not obtained the requisite preclearance of the voting changes identified in paragraphs 25-33, above, from the Attorney General of the United States, pursuant to Section 5 of the Voting Rights Act, as amended, 42 U.S.C. §1973c.

35. No judgment has been obtained from the United States District Court for the District of Columbia pursuant to Section 5 of the Voting Rights Act, as amended, 42 U.S.C. §1973c, declaring that the voting changes identified in paragraphs 25 through 33, above, have neither the purpose nor the effect of denying or abridging the right to vote on account of race or color.

36. The failure of the defendants to obtain the preclearance required by Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c, as described in the preceding paragraphs, renders the voting changes identified in paragraphs 25-33, above, legally unenforceable unless and until preclearance is obtained.

COUNT II

37. Plaintiffs reallege the factual allegations set forth in paragraphs 9 through 29, *supra*.

38. The defendants' decision to abandon the 2/3 Rule will harm minority voters and the ability of their elected representatives to protect their voting rights in the congressional redistricting process. As a result of the State's decision to abandon its traditional practices and procedures of the 2/3 Rule, the black and Hispanic Senators, as well as their constituents, are being deprived of the protections that the 2/3 Rule has afforded other legislators in prior sessions

when congressional redistricting is being considered. The decision to abandon the 2/3 Rule will result in discrimination on account of race, color, or membership in a language minority group in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973.

COUNT III

39. Plaintiffs reallege the factual allegations set forth in paragraphs 9 through 29, *supra.*

40. The defendants' decision to abandon the 2/3 Rule is aimed at a protected class of persons, minority voters and their elected Senators, in violation of 42 U.S.C. §1983, and the Fourteenth and Fifteenth Amendments to the United States Constitution. The defendants' decision to abandon the 2/3 Rule is motivated by a racially discriminatory purpose and will have a racially discriminatory effect in violation of 42 U.S.C. §1983, and the Fourteenth and Fifteenth Amendments to the United States Constitution.

COUNT IV

41. Plaintiffs reallege the factual allegations set forth in paragraphs 9 through 29, *supra.*

42. On August 7, 2003, defendants Perry and Dewhurst filed a petition in the Supreme Court of Texas. The extraordinary and unprecedented action of defendants Perry and Dewhurst seeks an Order from the state's highest court forcing the 11 Senators-plaintiffs to return from Texas and to attend the current special session. Never in the history of the State have state officeholders taken such actions against any Senators who either broke quorum or

otherwise failed to attend any legislative session or portion thereof. Forcing these Senators to return to the State will harm the representational interests of these plaintiffs-Senators and their constituents. By their presence in New Mexico, these plaintiffs-Senators are exercising their First Amendment rights of political speech and are providing their constituents, who are overwhelmingly opposed to congressional redistricting, with effective representation on this issue. Forcing these Senators to come back to Texas without the protections of the 2/3 Rule will result in the enactment of a new congressional map, which is contrary to the views and interests held by these plaintiffs-Senators and their constituents. Forcing these Senators to return to Texas and thereby enable a congressional redistricting bill to pass the Senate without the protections of the traditional 2/3 Rule is tantamount to forcing these Senators to violate the representational interests of their constituents, in violation of the First, Fourteenth and Fifteenth Amendments to the United State Constitution.

43. Defendants Perry and Dewhurst's actions are aimed at a protected class of persons, minority voters and their elected Senators, in violation of 42 U.S.C. §1983, and the First, Fourteenth and Fifteenth Amendments to the United States Constitution. Defendants Perry and Dewhurst's actions to use the judicial machinery of the State of Texas to solve a political and legislative problem is motivated by a racially discriminatory purpose and will have a racially discriminatory effect in violation of 42 U.S.C. §1983, and the First, Fourteenth, and Fifteenth Amendments to the United States Constitution.

WHEREFORE, plaintiffs pray that a court of three judges be convened pursuant to 42 U.S.C. §1973c and 28 U.S.C. §2284, and thereafter issue a judgment:

(1) Declaring that the State of Texas's decision to undertake congressional redistricting in 2003, despite the fact that it is operating under a legal plan ordered into effect for the decade by a three-judge federal court and affirmed on direct appeal by the United States Supreme Court, constitutes a change affecting voting within the meaning of Section 5 of the Voting Rights Act, as amended, 42 U.S.C. §1973c, and is legally unenforceable because the voting change has not received the requisite Section 5 preclearance;

(2) Declaring that the State of Texas's unprecedented decision to abandon the 2/3 Rule for congressional redistricting constitutes a change affecting voting within the meaning of Section 5 of the Voting Rights Act, as amended, 42 U.S.C. §1973c, and is legally unenforceable because the voting change has not received the requisite Section 5 preclearance;

(3) Declaring that the State's decision to abandon the 2/3 Rule for congressional redistricting in any special session, thereby depriving minority group Senators from utilizing the protections of the 2/3 Rule, violates the Fourteenth and Fifteenth

Amendments to the United States Constitution and Section 2 of the Voting Rights Act, 42 U.S.C. §1973;

(4) Enjoining the defendants, their agents and successors in office, and all persons acting in concert or participation with them, from administering, implementing or considering any congressional redistricting proposals until preclearance of the unprecleared redistricting procedure is obtained;

(5) If preclearance is obtained as prayed for above, enjoining the defendants from abandoning the 2/3 Rule on the grounds that the decision to do so is violative of Section 2 of the Voting Rights Act, 42 U.S.C. §1973 and 42 U.S.C. § 1983 and the First, Fourteenth, and Fifteenth Amendments to the United States Constitution.

(6) Ordering the defendants either to seek a declaratory judgment from the United States District Court for the District of Columbia or to submit to the Attorney General for administrative review pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c, the unprecleared change identified herein;

(7) Awarding plaintiffs all costs and disbursements in maintaining this action, and all reasonable attorneys' fees, pursuant to 42 U.S.C. §1973l(e) and 42 U.S.C. §1988; and

(8) Granting such further relief as the interests of justice may require.

Respectfully submitted,
/s/ Max Renea Hicks
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Appendix D

STATUTE

42 U.S.C. Sec. 1973c

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the

guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

Appendix E

Statement by
Senator Bill Ratliff
July 14, 2003

I have today advised Lieutenant Governor Dewhurst that I am in possession of a statement signed by 10 members of the Texas Senate stating their unalterable opposition to any motion to bring a congressional redistricting bill to the Senate floor. I have advised the Lieutenant Governor that I am adding my name to that statement.

The Senate has now completed hearings across the state on this subject. Chairman Robert Duncan and the members of his committee have reported to the members of the Senate that the overwhelming majority of citizens appearing at these statewide hearings are opposed to such redistricting, including many local activist Republicans and locally elected Republican officials.

It is clear that those who are leading this effort apparently have no knowledge of, or regard for, the representative balance between the urban/suburban power base and the diminishing influence of the rural/agricultural community. The maps produced so far have indicated a total lack of concern for the communities of interest in rural Texas.

The current congressional lines produce 20 Republican seats, 19 of which have a Republican strength of at least 55%. The majority of the Senate members, in both parties, have indicated to me that the costs associated with

this effort are not justified by the marginal gains to the Republican congressional delegation.

Moreover, most members of the Senate fear that the costs of this effort are far more serious than the mere financial cost of the litigation which is sure to follow. The costs anticipated by these members are associated with the level of animosity and distrust among members of the Senate which will result from such a vitriolic battle.

We, in the Senate, pride ourselves in being able to work in a bipartisan manner for the people of Texas – the same bipartisan spirit which President George W. Bush nurtured so vigorously and which he was so proud when he was Governor. I will not be a part of the destruction of that spirit for the sake of a theoretical marginal partisan gain in the Texas congressional delegation.

Appendix F

AFFIDAVIT OF PATSY SPAW

THE STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFOREME, the undersigned authority, on this day personally appeared Patsy Spaw, who is personally known to me to be the person subscribing her name below, and after being duly sworn by me according to law, on there oath deposed and stated:

"My name is Patsy Spaw, and I am the Secretary of the Senate and custodian of its records. I am over twenty-one and in all ways competent to sweat out this affidavit. All information provided herein is within my personal knowledge and it true and correct."

"Under Senate Rule 5.12, bills are considered on second reading 'in the order in which the committee reports on them are received by the Senate.' Under Rule 5.13, bills may be taken out of order when 'the regular order is suspended by a vote of two-thirds of the members present."

"Because of these rules, a bill is often introduced at the beginning of a session that is intended to be the first bill out of committee, with an informal understanding that the bill, usually on an innocuous subject, will not be voted upon by the full Senate. This bill is then known as a 'blocker bill' and remains at the top of regular order, and following bills are then taken up on second reading after the regular order of business has been suspended by a two-thirds vote."

"Blocker bills receive no official designation by the Senate; whether or not a bill may be considered 'blocker bill' depends on the Senators' informal understanding or agreement. There is no prohibition against Senators' voting out or otherwise disposing of a purported 'block bill' and thus allowing subsequent bills to be taken up without a need to suspend the rules."

"Furthermore, whether or not a bill is treated by the Senate as a 'blocker bill' depends on the actions taken by many people. First, a Senator must introduce a bill that is not intended for actual passage. The committee considering the bill must then ensure that it is the first bill reported out of committee. Occasionally, a Senator will intend a bill to serve as a 'blocker bill' but the committee will not vote it out in time to be used as such. For example, in 1991, under Lieutenant Governor Bob Bullock, a bill intended to serve as a blocker bill was introduced in the Fourth Called Session of the 72nd Legislature. Although the bill was filed and referred to committee, it was never reported form committee. No other bill served the 'blocker bill' role."

"In some cases, bills that might otherwise have been 'blocker bills' have been voted out of the Senate or otherwise disposed of in order to avoid the need for a tow-thirds vote to take subsequent bills out of order. For example, in 1961, under Lieutenant Governor Ben Ramsey, the Senate disposed of three House bills before reaching H.B. 533, relating to the Texas Liquor Control Act. One bill was postponed by unanimous consent, another was recommitted to committee, and the third was laid out and passed. H.B. 533 was then laid out on second reading without suspension of the regular order. It passed to a third reading on a voice vote with 14 senators recorded as voting

no. Suspension of the three-day rule failed by a 14 to 14 vote."

"Sometimes a bill will not get the two-thirds vote to suspend the regular order, but will be passed later when it arrives at the top of the regular order of business. For example, on Tuesday, June 25, 1968, under Lieutenant Governor Preston Smith, an attempt was made to suspend the regular order of business to bring up H.B.2, a tax bill, on second reading. The motion to suspend failed 14 to 16. The next day was a House Bill day, and H.B.2 was first on the list of House Bills and was laid out before the Senate without a two-thirds suspension vote."

"Often, Senators will vote to suspend the regular order of business even when they are not considering bills out of order. For example, in the Third Called Session of the 62th Legislature, there was only one bill introduced. Nevertheless, the regular order of business was still suspended in order to take up the bill."

"Historically, according to the Senate *Journal* there were many times that the Senate did not recognize a 'blocker bill' and therefore did not suspend the regular order of business by a two-thirds vote when considering bills that were at the top of regular order. Instances where the Senate followed this practice occurred in the Third Called Session of the 63 rd Legislature, the First Called Session of the 59th Legislature, the Second Called Session of the 57th Legislature, and the Second Called Session of the 55th Legislature."

Further, Affiant sayeth not.

/s/ Patsy Spaw
Patsy Spaw, Affiant

SUBSCIRBED TO AND SWORN BEFORE ME, on August 15, 2003, to certify which witness my hand and seal of office.

Notary Public in and for the State of Texas

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

GONZALO BARRIENTOS, RODNEY ELLIS, MARIO GALLEGOS, JR., JUAN "CHUY" HINOJOSA, EDDIE LUCIO, JR., FRANK L. MADLA, ELIOT SHAPLEIGH, LETICIA VAN DE PUTTE, ROYCE WEST, JOHN WHITMIRE, and JUDITH ZAFFIRINI,	)
Plaintiffs,	)
	)No.) L03-113
STATE OF TEXAS; RICK PERRY, In His Official Capacity As Governor Of The State of Texas; DAVID DEWHURST, In His Official Capacity As Lieutenant Governor and Presiding Officer Of the Texas Senate,	)
Defendants.	)

DECLARATION OF EDWARD BRIAN GRAHAM

Pursuant to 28 U.S.C. 1746, I, Edward Brian Graham, declare that:

1. My name is Edward Brian Graham. I have previously submitted a sworn Declaration in this case. I reside at 1311 Berkshire Drive in Austin, Texas.

2. At the request of attorney J. Gerald Hebert, I have reviewed the Affidavit of Ms. Patsy Spaw, Secretary of the Texas Senate, dated August 15, 2003, which I understand has been filed with the court in this case. In the affidavit Ms. Spaw outlines the Senate Rules and procedures involved in bringing bills before the Full Senate for debate through a motion to Suspend the Regular Order of Business and the use of what is termed a "Blocker Bill" in that process.

3. While generally correct, Ms. Spaw's account, in my opinion, fails to clearly indicate that the existence of a blocker bill is not a prerequisite to placing a bill before the Senate by virtue of a motion to suspend Senate rules, where such a motion requires either unanimous consent or the votes of an extraordinary majority of the members of the Senate. Consequently, the Affidavit could, quite unintentionally, lead one to the invalid conclusion that where there is no blocker bill, the Senate consistently uses some other method to bring a bill to the Senate Floor. In fact, my research suggests that is clearly not the case.

4. For background, it is necessary to explain that the 'blocker bill' is a proposed piece of legislation that is rushed through the Senate committee process so that it will be the first measure reported from a Senate committee. Under the Senate's operating procedures and Rules, this places the blocker bill at the head of

the official Senate Calendar, which is a list of bills reported from Senate committees in the order in which they were reported from those panels. What makes the blocker bill important is that its author never intends that it will be taken up by the Senate.

5. If the Senate were to operate under the "Regular Order of Business:" it would be required to debate and vote on the bills listed in the Calendar in that order. The result could be that major legislation, which takes longer to be considered and adopted by the committees, would appear far down the list and there might not be time for it to be considered by the Full Senate before the legislative session ends.

6. To avoid that possibility, the Senate uses the method of adopting a motion to suspend the Regular Order of Business rule and take up a bill out of its normal order. The adoption of this motion requires either the unanimous consent of all the Senators present or, in lieu of that, the affirmative vote of two-thirds of the members present (or 21 votes if all 31 Senators are present) even though only a majority vote (16 if all are present) is actually required to enact the bill after a supermajority of senators has agreed to take it up out of order.

7. This practice or procedure of filing a blocker bill and requiring that a supermajority (2/3) of senators vote to take up a bill out of order has been a consistent practice in the Texas Senate for decades. Around the Senate, senators often refer to this process as "the 2/3 Rule".

8. The primary purpose (and benefit) of the use of this suspension method is that it often forces the Senate to reach a compromise on controversial and significant legislation in order to obtain the 21 votes necessary to suspend the rules. (See the attached excerpt from my privately published manual, *The Texas Legislature: A Guide to the Legislative Maze*, for a fuller explanation of the blocker bill system.)

9. It is not clear exactly when the blocker bill system was adopted, however, Ms. Spaw has stated that the Senate has regularly used some sort of a motion to suspend the rules (and therefore requiring a supermajority vote) to bring up a bill for 100 years, with the use of a blocker bill as a part of that method since about 1949.[1]

10. A blocker bill is not absolutely necessary, however. In fact, it is often not used in Special Sessions. However, by Senate tradition, even without a blocker bill, it has been the practice of the Texas Senate to use some form of the suspension method when dealing with controversial and significant legislation. Nor is the use of a blocker bill an official part of the Senate Rules, but over the years it has become an integral part of the legislative process and is well known and highly regarded practice of the Texas Senate.

11. A motion to suspend the rules is not the only method the Senate may use in order to place a bill before the

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[1] See Letter of July 15, 2003, from Ms. Patsy Spaw, Secretary of the Texas Senate, to Senator Leticia Van de Putte (D-San Antonio).

Full Senate for debate. The most commonly used other method is for the presiding officer of the Senate to lay a bill before the Senate without the necessity of any Senator making a motion or any vote on the question. (When this happens the *Senate Journal* will usually indicate it by stating "The President laid before the Senate..." The *Journal* then usually goes on to state whether it is for second or third reading, and shows the caption of the specific bill.)

12. This other method has occasionally been used by presiding officers to bring a controversial measure before the Senate when it has proven impossible to obtain the approval of two-thirds of the senators. However, that is a rare deviation from the established Senate practice or procedure, and it is considered a highly controversial act as well. An attempt to do so is, in fact, at the heart of the current controversy that has blocked the Senate from meeting during the current Second Called Session of the 78th Legislature. An announced plan by then Lt. Governor Hobby to do the same was also the spur for the "Killer Bees" episode in 1979 when a group of Democratic senators broke the Senate's quorum to block passage of a presidential primary proposal.

13. Because the two-thirds rule is usually considered sufficient protection for minority interests, organized efforts to block Senate action by denying it a quorum of members required to meet are rare. It is also quite difficult to arrange for at least 11 senators to be absent at the same time. Prior to the current case, the last such quorum break was in 1993 when the Republican members of the Senate spent a day

hidden in a Capitol building office to block action on a bill they opposed.

14. The principal benefit of using this system on controversial measures is that the procedure bypasses the need to compromise on the legislation. It can also be implemented by the lieutenant governor, in his role as president of the Senate, without any motion or vote by the members of the Senate. In addition, since there is no appeal from his action, this leaves Senators who object to deviating from the Senate's normal no alternatives other than to vote on the bill or to 'break the quorum" by leaving the Senate.

15. The "lay a bill before" system is, however, frequently used by the Senate to allow it to more rapidly pass purely local bills (which affect only one governmental entity) or uncontroversial measures through what is known as the "Local & Uncontested Calendar System". This system places bills before the Senate without a motion to suspend any other rules, but is specifically limited to non-controversial and local bills. That fact is enforced by Senate Rules which provide: (a) that the bill must be recommended for passage on the Local & Uncontested Calendar by the Senate Committee which considered it; (b) that, in turn, it must be approved by a vote of the separate Senate Committee on Administration; and (c) that a complete list of the bills to be included on the Calendar be provided to all senators at least 24 hours before the bills are to be debated.. These requirements are then backed up by a provision that allows any two members of the Senate to remove a bill from the Local &

Uncontested Calendar by simply filing a written notice of objection to the measure. Suspending any of these requirements is virtually impossible, since the Senate rules provide that it requires the unanimous consent of all the members present to do so. (Senate Rules 9.01 through 9.07.)

16. In my opinion, the major failure of Ms. Spaw's Affidavit is that it fails to make clear that the absence of a blocker bill does not mean that the Senate automatically uses the "lay a bill before" method to place bills before the Full Senate. Her failure to make this clear may be interpreted to suggest that the Legislature used that method to pass the majority, if not all, the bills considered by the Senate in the six (6) Special Sessions cited by Ms. Spaw. For example, Ms. Spaw's affidavit (p.2) states that:

> "Historically, according to the *Senate Journal* there were many times that the Senate did not recognize a 'blocker bill' and therefore did not suspend the regular order of business by a two-thirds vote when considering bills that were at the top of the regular order. Instances where the Senate followed this practice occurred in the Third Called Session of the 72nd Legislature, the First Called Session of the 65th Legislature, the First Called Session of the 63rd Legislature, the First Called Session of the 59th Legislature, the Second Called Session of the 57th Legislature, and the Second Called Session of the 55th Legislature.

17. This statement by Ms. Spaw may be technically correct to the extent that a 'blocker bill' was not

being used on these occasions. However, it gives the invalid impression that the Senate did not use a method requiring an extraordinary majority vote in order to consider bills during those sessions when, in fact, it did. It is also noteworthy that Ms. Spaw cited as examples only six (6) of the thirty-five (35) special sessions called during the same period of years covered by her examples.[2]

18. In fact, my review of the official bill histories contained in the Senate Journals for the six Special Sessions cited by Ms. Spaw clearly demonstrates that, even without the use of a blocker bill, most of the legislation considered during those particular Special Sessions reached the Senate Floor as a result of a motion to suspend one or more of the Senate's rules, where either unanimous consent or an extraordinary majority vote was required.

19. A Session by Session review of the particular Special Sessions cited by Ms. Spaw is attached to this memorandum. However, a brief analysis of that review shows the following:

- An estimated 65 bills were placed before the Senate for its consideration during the six special sessions.

- Of these 65 bills, 53 were brought before the Senate by a motion that required either unanimous consent or the affirmative vote of an extraordinary majority of the members of the Senate.

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[2] Texas Legislative Reference Library, printout entitled "Texas Legislative Sessions and Years", August 20, 2003.

- Of the remaining 12 bills "Laid before the Senate" without a vote, 10 had clear racial or political, or both, attributes.

- Included in those 10 measures were: Four bills passed by what has been called the "Segregation Forever" Session in 1957 in its attempt to block the desegregation of public schools in Texas; a bill that would have changed the method used to fill vacancies in the U.S. House of Representatives; a voter registration bill to replace the poll tax that required annual registration with the registration period limited to only 30 days per year; and four bills would have implemented agreements with minority plaintiffs for the reapportionment of the Texas House of Representative and Texas Senate to replace plans more favorable to the Republican Party.

20. My conclusion is as follows: the use of the any method to place a bill before the Senate other than by a motion to suspend the rules (which requires a two-thirds vote of members present under the Senate Rules) is a clear deviation from the normal, established Senate practices and procedures. Moreover, in the few instances cited in the Spaw Affidavit when a procedure has been used to place a bill before the Senate without suspending the senate rules, this has occurred most frequently for bills with some racial or political purposes.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

/s/ Edward Brian Graham
Dated: August 21, 2003 Edward Brian Graham

Attachment:

An excerpt from *The Texas Legislature: A Guide to the Legislative Maze*, 6th Edition, by E. Brian Graham (privately printed November 1999).

The Senate System

The Senate also has a calendars committee but uses it only for local and uncontested bills through a special process known as the Senate Local & Uncontested Calendar. (It is actually the Senate Administration Committee which also takes care of the Senate's housekeeping matters.)

Other bills--including all the major legislation--are brought before the Senate through a system known as 'suspending the regular order of business'.

Under the 'suspending the regular order of business' system bills emerging from Senate committees are placed on a list in the order in which they were reported from the committees. This list is called the 'Senate Calendar.'

If the Senate followed 'the regular order of business,' it would consider the bills in the order they appear on the calendar and would not be able to consider a bill listed somewhere down the calendar until it had completed action on all those which precede it on the list. But, it doesn't. Instead, a 'tradition' has been developed under which bills are 'brought up out of the regular order' by a suspension motion.

This system is designed to ensure that, before a bill comes to the Floor, it has the support of an overwhelming percentage of the senators. It also gives the Senate a way to move important bills directly to the Floor, bypassing the many less significant measures that may precede it on the calendar.

To make this system work, the Senate traditionally places or 'parks' a bill at the very top of the calendar that it never intends to pass. This bill--known as the 'blocker'--serves as a block to all other legislation unless the 'regular order of business' is suspended. (A House Bill--usually one whose Senate companion has already passed the Senate--is also 'parked' on the calendar as the first House bill to make the same system work on House Bill Days when House bills move to the top of the calendar.) No effort is made to debate and pass the bill so none of the bills behind it on the calendar can be considered unless such a motion is made.

On minor bills, this motion can be approved 'by unanimous consent' without the necessity of taking a vote. But, if even one senator 'objects,' the Senate requires a formal vote on the motion to allow debate on the measure.

This *motion requires the support of two-thirds of all the senators* present and voting at the time. This means that *if all 31 senators are present, it will require 21 votes in favor of the motion to bring up the bill.* If 30 are present, it will take 20, and so forth. *(During the first 60 days of the session, the Senate requires a four-fifths vote*, or 25 'yes' votes when all 31 senators are present, to bring a bill up.)

What makes the Senate's procedure unusual is that, *once a normal bill or resolution has been moved off the calendar for debate, it requires that only a majority vote for it to pass the*

Senate. But, while it only takes 16 votes to pass a bill--if all 31 senators are voting--*it takes five more votes just to discuss it.* This means that even if a majority of the senators favor a bill, a minority can defeat it by voting not to suspend the rules. (Constitutional amendments require both a two-thirds vote to be debated and a two-thirds vote to be passed.)

The 'blocker' system is a Senate 'tradition' and not required by the Rules, but, like most Senate traditions, it has strong support. Lt. Governor Hobby honored it on all but two occasions during his term in office--in 1979 when his action resulted in the 'Killer Bee affair' and during the Second Called Special Session in 1989 when he 'reserved the option' of following the regular order of business in order to help pass a controversial measure revising the state's workers compensation insurance laws. However, he did not exercise that option at that time. (See QUORUMS & VOTING.)

The lieutenant governor plays an important role in determining which bills will reach the Senate Floor since a suspension motion can only be made if he agrees to allow it. This means that *Senate members must find a way to convince the lieutenant governor to let them bring their bills up.*

Lt. Governor Hobby used the power to block a suspension vote sparingly. He generally recognized any senator who had complied with the Senate Intent Calendar Rule and who demonstrated that he had enough votes lined up to approve the suspension motion. Lt. Governor Bullock followed Hobby's lead in this area.

Getting the required votes to suspend the rules and take up a bill often requires a senator to make deals with other members of the Senate. He may, for example, be required to trade votes

with other senators and agree to vote to suspend the rules for one of their bills if they agree to vote for his, or he may have to agree to accept some change they want to make to his bill.

Because these negotiations are done off the Senate Floor--often in the members' lounge, which is closed to the public--when the Senate actually votes on a bill, it usually moves very fast. The deals have been cut, the votes are lined up and the bill is passed in only a few minutes. As such, the Senate is often less exciting to watch than the House, where lengthy debates are common.

The Senate requires that the rules be suspended each time the bill comes up. This means the same process of suspending the rules must be used for the Second and Third Readings of the bill. It is, therefore, possible for a bill to pass the Senate on second reading, but fail to pass on third because a senator who voted to suspend the rules the first time refuses to do so again. But--just as in the House--it is rare for a bill which reaches the Floor to be defeated.

Appendix H

DECLARATION OF EDWARD BRIAN GRAHAM

Pursuant to 28 U.S.C. §1746, I, Edward Brian Graham, declare that:

1. My name is Brian Graham. I reside at 1311 Berkshire Drive, in Austin, Texas.

2. A brief description of work experience is as follows: I was employed in or around the Texas Legislature from November of 1971 through the end of the Regular Session in 2001. The specific positions I held during that period included: Capitol news correspondent, 1971-1972; campaign employee for a Republican candidate in a state senate race, 1972; Chief Clerk, House Committee on Elections, 1973-1977 (said to be the first to serve under both two different chairs and two different speakers); Executive Assistant to a Democratic member of the Texas House of Representatives, 1978-1981; assistant committee clerk, Senate Committee on Natural Resources, and press secretary to a minority member of the Texas Senate 1981-1983 (August); Researcher for the Comptroller of Public Accounts working as chief bill reader/analyst in the Legislative Analysis Group, 1983-1990, in which position, I among other things, conducted seminars and authored a manual on legislative rules and procedures (now in its sixth edition); Special assistant and head of Bill Tracking & Analysis section for the Lieutenant Governor, 1991-1998 (February); Texas Legislative Council, 1998-1999 (January); I officially retired from the state at the end of January, 1999, but was employed to conduct special research for the Secretary of the Texas Senate, Regular Session, 1999, and Regular Session, 2001. All those

positions required a knowledge of the history, procedures and rules of the Texas Legislature, as demonstrated by the use of my manual in a private legislative training school in 1999 and by my being requested to provide pre-session training in legislative rules and procedures to the staff of the Texas Sunset Advisory Commission before the last four Regular Sessions. As outside employment I was employed by a number of political campaigns over the years to do legislative research including Peyote McKnight for Governor, 1982; Bob Bullock Comptroller Re-election, 1982; and on a number of occasions by Emory, Young & Associates (political consultants). My educational background is as follows: graduate, Marian High School, Houston, Texas (no longer operating); University of Notre Dame, BA-History (1966); some graduate work, University of Texas at Austin (Government) 1967-68.

3. I was requested by attorney J. Gerald Hebert to review actions of the Texas Senate taken during past redistricting cycles to determine whether there has been a particular practice or procedure in place with respect to congressional redistricting. More specifically, I was asked to determine if the Texas Senate has administered a practice or procedure in considering congressional redistricting legislation that required an extraordinary vote (*i.e.*, a vote of two-thirds or more) of the Texas Senate in order for the full Senate to take up such legislation. As detailed in Exhibit A to this Declaration, which is incorporated herein by reference, my "general finding...is that it appears to have been the practice of the Senate over virtually the entire Century to use methods requiring a vote or the approval of the extraordinary majority of the members of the Senate in order to lay congressional redistricting legislation before the Full Senate for its consideration."

4. With regard to the period from 1971 to the present, my review showed the following:

a. In 1971, during the regular session, the Texas Senate voted to ***Suspend the Regular Order of Business*** by unanimous consent to take up congressional redistricting. To suspend the Regular Order of Business requires an extraordinary or supermajority vote of the senate (a two-thirds vote). Although congressional redistricting legislation passed on second reading by a non-recorded vote, and the constitutional rule requiring a three day reading was suspended by a vote of 23 Aye, 5 Nay (a measure that requires approval of three-fourths of the senate), the measure died in conference committee. In the first called special session of 1971, congressional redistricting legislation ***passed by a combined motion to Suspend the Regular Order of Business***, pass on Second Reading, Suspend the Constitutional Rule and Pass on Third Reading. ***This practice or procedure required an extraordinary or supermajority of votes in order to pass.*** Thus, as of 1971, the practice or procedure used by the Texas Senate in considering congressional redistricting employed an extraordinary majority requirement before the full Senate would consider such legislation.

b. In 1981, Congressional Redistricting in the Senate during the 67th Legislature was

governed by the terms of a Senate Resolution (SR 256), which provided that reapportionment measures were to be placed before the Senate under a Special Order, rather than by a Suspension of the Regular Order of Business. ***SR 256 was adopted by the Senate by a vote of 27 Aye, 1 Nay, and thus was approved by a supermajority.*** SR 256 established that these Special Orders would require only a majority vote for adoption, rather than the two-thirds vote normally required to set a Special Order. The specific provision providing for a Special Order by a majority vote was adopted on a separate vote of 21 Aye, 7 Nay—again a supermajority (three-fourths) of senators.

c. In 1991, an attempted suspension of the Regular Order of Business by unanimous consent, failed***; then the Senate voted to suspend the Regular Order of Business, a measure that requires two-thirds of the Senate,*** by a vote of 21 Aye, 10 Nay. Thereafter, the congressional redistricting bill passed on Second Reading by a voice vote, which was then followed by a vote to Suspend the Constitutional Rule (which requires an extraordinary or supermajority vote of three-fourths of the senate) by a vote of 26 Yeas, 5 Nays. The Constitutional Rule of having a bill lay over for three days having been suspended, the bill was then approved on Third Reading by a vote of 18 Yeas, 13 Nays.

d. In 2001, no congressional redistricting measures were taken up in the Texas Senate. ***At that time, the chair of the Senate Redistricting Committee (State Sen. Jeff Wentworth (R-San Antonio), was publicly quoted as stated that he would be unable to obtain the necessary two-thirds vote to bring a bill to the Senate Floor.***

e. Attempts were made to pass congressional redistricting in both the Regular Session and First Called Session in 2003, but in both cases, no bill was brought to the Senate Floor. ***Press accounts attributed the failure to the inability of the bill sponsors to obtain the necessary two-thirds vote required to suspend the Regular Order of Business*** to consider such a bill. Included in those accounts were reports that all the Democratic members and one Republican member of the Senate had informed the Lieutenant Governor in writing that they would oppose such a motion.

I declare under penalty of perjury that the statements herein are, to the best of my knowledge, true and correct.

Dated: August 10, 2003

/s/ Edward Brian Graham
Edward Brian Graham

EXHIBIT A TO DECLARATION OF BRIAN GRAHAM

Congressional Redistricting and the Texas Senate During the 20th Century

My review of the official Senate *Journal* for the years of 1901 through 2001 shows that the Texas Senate voted on at least eleven (11) bills to reapportion the United States Congressional Districts in Texas over that 100 years.[1]

The general finding of the review is that it appears to have been the practice of the Senate over virtually the entire Century to use methods requiring a vote or the approval of the extraordinary majority of the members of the Senate in order to lay congressional redistricting legislation before the Full Senate for its consideration.[2] All official decisions on how to bring a congressional redistricting bill to the Senate Floor during the period I studied were made by motions on the Senate Floor and by votes of the members of the Senate themselves. In addition, any changes in those procedures were approved by an extraordinary majority vote. The Lieutenant Governor cast no votes on those occasions nor was he empowered to change any of the procedures.

The only significant variation from this policy was in 1981 when only a majority vote was required. However, in the case of 1981, the *Journal* shows that, the decision to change from an extraordinary majority was approved by the

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[1] During the first half of the 20th Century, the Texas Legislature did not reapportion congressional districts in Texas after each national census. It did not begin that practice until after the establishment of the "one-man, one-vote" principle by federal courts in *Baker v Carr* [369 U.S. 186 (1962)]. Prior to that time, it had approved such measures only in 1917, 1933 and 1957. The first act after *Baker v Carr* was in 1965.

vote of an extraordinary majority of the Senate. (The only other possible variation was in a Special Session in 1933 when the Senate considered a bill to move one county from one congressional district to another. This bill was apparently considered what is termed a "local bill" which affects only one Senator and was simply laid out by the Lieutenant Governor. It died in the House of Representatives.)

The analysis reviewed bills voted on by the Full Senate during both Regular and Called or Special Sessions of the Legislature both before and after the adoption of what has been termed the "two-thirds rule" and the accompanying "blocker bill" system by the Senate. It also examined measures passed by the Senate when there was such a "blocker bill" in place and when there was no such measure pending on the Senate Calendar. As noted above, with the one exception in 1981, the policy appears to have been to use an extra-ordinary majority vote in both Regular and Special Sessions of the Legislature both before and after the adoption of the two-thirds rule and with or without a blocker bill.[2] Even in 1981, while the congressional redistricting legislation ultimately was considered by a simple majority of the Texas Senate, such consideration only took place after the Texas Senate had voted 27 to 1 (a near unanimous extraordinary majority) to approve a Senate Resolution (SR

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[2] According to the Secretary of the Senate, the policy of requiring a two-thirds vote to Suspend the Regular Order of Business in order to consider a bill dates back at least 100 years. The Senate's Order of Business Rule was first adopted in 1947. The exact date for the beginning of the practice of using what is termed a 'blocker bill' to enforce that policy is not known, although it is generally attributed to have been adopted by Lt. Gov. Alan Shivers in 1949. Letter of July 15, 2003, from Secretary of the Senate Patsy Spaw to Senator Leticia Van de Putte.

256), which provided that reapportionment measures were to be placed before the Senate under a Special Order requiring only a simple majority.

A listing of the individual measures considered by the Senate during the years of 1901 through 2001 and the method used to lay the proposal before the Full Senate is as follows. All page numbers are from the official *Senate Journal* for the respective Legislature. The method used to place the bill before the Senate is showing in ***bold-faced, italic print.***

35th Legislature (1917)

Regular Session

Measure Senate Bill (SB) 11.

History: ***Placed before the Senate as the result of a motion to set the bill as a "Special Order***--p. 247; Passed to Engrossment (Second Reading) by a non-recorded vote--p. 276; Suspension of the Constitutional Rule by a vote of 25 Yeas, 1 Nays, 1 Present-not-voting, 3 Absent, 1 Absent-excused - p.288; Final passage by a non-recorded vote--p. 288.[3]

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[3] The Rules in use for the 1917 and 1933 sessions appear not to have specified the vote requirement for a Special Order beyond a general provision requiring a two-thirds vote to suspend rules for which the total is not specified. Legislative precedent is to be guided on such questions by the terms of such other publications as *Robert's Rules of Order* and *Mason's Manual of Legislative Procedure Robert's* specifically specifies that a Special Order requires a two-thirds vote (Section 13, Orders of the Day), and *Mason's* suggests the same. (In Sec. 264, it provides that

No congressional redistricting bill was then adopted until the 43rd Legislature in 1933.

43rd Legislature (1933)

Regular Session

Measure: SB 195

History: ***Set as a Special Order***, no vote recorded—591; laid on the table, subject to call, no vote recorded—p. 640; Rules suspended, no vote recorded - 661; considered on Second reading—p. 661; Set as a Special Order—p. 670; passed to engrossment—p. 670; Constitutional Rule suspended by a vote of 27 Yeas, No Nays—670; final passage by a vote of 22 Yeas, 4 Nays—p. 670.

First Called Session:

Measure SB 64. (The bill was virtually a "local bill" that would have moved Duval County from Congressional District 14 to Congressional District 15. By Senate "tradition" such a measure is generally passed without opposition since it affects only the Senate author.)

History: ***Laid before Senate by the Lt. Governor***—p. 189; Point of Order that congressional reapportionment is to last for 10 years and the Legislature had just approved such a

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"Whenever the making of a special order sets aside the general rules regarding the order of business, the same vote is required as would be required to specifically suspend the rules." In our Senate, this would be a two-thirds vote.) In any case, the motions appear to have been adopted in both 1917 and 1933 without objection - i.e. - or by unanimous consent.

measure in the Regular Session, overruled—p. 189; passed to engrossment—p. 189; Constitutional Rule suspended by a vote of 31 Yeas, No Nays—p. 189; final passage—p. 189. The House Committee on Congressional & Legislative Districts subsequently reported the bill "unfavorably" and it died in the House after the Speaker ruled a motion to print a minority report as being out of order. House Journal, pp. 530, 611.

No congressional reapportionment measure was then adopted until the 55th Legislature met in 1957.

55th Legislature (1957)

Regular Session

Measure: House Bill (HB) 229

History: ***Suspension of the Regular Order of Business*** by a vote of 25 Yeas, 7 Nays pp. 122-1223; passed on Second Reading by a voice vote p.1226; Suspension of the Constitutional Rule, failed by a vote o f 18 Yeas, 10 Nays (not obtaining the necessary four-fifths vote) pp. 1226-1227; Suspension of the Regular Order of Business for Third Reading, failed by a vote of 15 Yeas, 12 Nays (not obtaining the necessary two-thirds vote) p. 1336; Suspension of the Regular Order of Business for Third Reading, prevailed by a vote of 18 to 7 p. 1336; amended on Third Reading by a vote of 25 Yeas, 1 Nays (amending of Third Reading requires a two-thirds vote p. 1336; Final passage by voice vote.

Following the United States Supreme Court ruling in *Baker v Carr,* the Legislature next reapportioned the congressional districts in Texas in 1965.

59th Legislature (1965)

Regular Session

Measure: HB 67

History: ***Suspension of the Regular Order of Business*** by a vote of 26 Yeas, 5 Nays, p. 1895; passage on Second Reading by a voice vote—p. 1907; Suspension of the Constitutional Rule by a vote of 27 Yeas, 2 Nays—p. 1907; passage on Third Reading by a voice vote—p. 1907.

62nd Legislature (1971)

Regular Session:

Measure: HB 782

History: ***Suspension of the Regular Order of Business*** by unanimous consent p.1667. Passed on Second reading by a non-recorded vote p. 1675. Constitutional Rule Suspended by a vote of 23 Yeas, 5 Nays p. 1675. Passed on Third Reading by a non-recorded vote p. 1675. Died in Conference Committee.

First Called Session

Measure: HB 782 (Picked up from Regular Session version)

History: ***Passed by a combined motion to Suspend the Regular Order of*** Business, pass on Second Reading, Suspend the Constitutional Rule and Pass on Third Reading by a vote of 25 Yeas, 4 . Journal recorded votes on 2nd and 3rd Reading as voice votes p. 11.

67th Legislature (1981)

Regular Session

Redistricting in the Senate during the 67th Legislature was governed by the terms of a Senate Resolution (SR 256) which provided that reapportionment measures were to be placed before the Senate under a Special Order, rather than by a Suspension of the Regular Order of Business. SR 256 also established that these Special Orders would require only a majority vote for adoption, rather than the two-thirds vote normally required to set a Special Order. ***SR 256 was adopted by the Senate by a vote of 27 Yeas, 1 Nays.*** The specific provision providing for a Special Order by a majority vote was adopted on a separate vote of 21 Yeas, 7 Nays—pp. 337, 356, 357. As such, this deviation from the traditional practice was approved by an extraordinary majority of two-thirds of the Senate. ***In addition, the first time the provision was used it was adopted by an extraordinary majority vote.***

Measure: HB 1400

History: ***Set as a Special Order (majority vote only)*** by a vote of 28 Yeas, 3 Nays (an extraordinary majority)—p. 1408; passed on second reading by a vote of 14 Yeas, 14 Nays, 1 Present-not-voting, President voting Yea to break the tie—pp. 1462-1463; Constitutional Rule Suspended by a

vote of 24 Yeas, 5 Nays—p. 1465; passed on Third Reading by a vote of 16 Yeas, 13 Nays—p. 1465; the bill did not pass the Legislature.

First Called Session

Measure: SB 1

History: Motion to Set the bill as a Special Order, failed by a vote of 11 Yeas, 16—p, 26; Motion to Suspend the Regular Order, failed by a vote of 15 Yeas, 12 Nays (not obtaining the necessary two-thirds vote)—p. 26. Parliamentary ruling that terms of SR 256 (see above) also applied to the Called Session—p. 26; ***Set as a Special Order (majority vote only)*** by a vote of 17 Yeas, 14 Nays—p. 26; passed on Second Reading by a vote of 19 Yeas, 12 Nays; Constitutional Rule Suspended by a vote of 25 Yeas, 6 Nays, final passage by a vote of 19 Yeas, 12 Nays—pp. 131-132.

68th Legislature, Regular Session (1983)

Measure: SB 480 (enacting provisions of court ordered plan)

History: ***Suspension of the Regular Order*** by unanimous consent--p. 947; passed on Second Reading by a voice vote--p. 953; Suspension of the Constitutional Rule by a vote of 24 Yeas, 5 Nays—p. 953. Final Passage by a vote of 23 Yeas, 6 Nays-- 953.

72nd Legislature (1991)

Second Called Session

Measure: HB 1

History: Suspension of the Regular Order of Business by unanimous consent, failed—p. 134***; Suspension of the Regular Order of Business*** by a vote of 21 Yeas, 10 Nays—p. 134; passage on Second Reading by a voice vote—p. 137; Suspension of the Constitutional Rule by a vote of 26 Yeas, 5 Nays—p. 137; passage on Third Reading by a vote of 18 Yeas, 13 Nays—p. 137.

Following a series of court decisions, the House of Representatives passed a congressional reapportionment during the 75th Legislature in 1997 but the bill was not passed by the Senate.

Neither the Texas House or Representatives or the Texas Senate enacted a congressional redistricting measure during the 77th Legislature in 2001.

Appendix I

DECLARATION OF GONZALO BARRIENTOS

Pursuant to 28 U.S.C. §1746, I declare that:

1. My name is Gonzalo Barrientos and I am a member of the Texas Senate.

2. The two-thirds Rule is a practice or procedure of the Texas Senate and is designed to protect a significant minority of Senators (*i.e.,* an excess of one-third) against any piece of legislation that is perceived to be against or harmful to their interests. When the two-thirds Rule is in effect, a third of the Senators present can block any piece of legislation from reaching the Senate floor. The Texas Senate is comprised of thirty-one members: twelve Democrats and nineteen Republicans. Thus, eleven members of the thirty-one member Texas Senate (35.5%) can band together to block a piece of legislation from being considered in the Texas Senate when the two-thirds Rule is in effect.

3. In the 2003 first special session, the two-thirds Rule was in effect in the Texas Senate. After the session started, at least eleven senators joined together and announced that they would oppose any congressional redistricting bill from being considered by the Texas Senate. This had the effect of blocking any consideration of congressional redistricting by the full senate in the first special session of 2003. In 2001, Anglo Republican Senators also utilized the protection of the two-thirds Rule to block a

congressional redistricting plan from being considered by the Texas Senate.

4. Well in excess of 90% of the citizens of Texas who attended public field hearings during June and July 2003 and who took a position on redistricting (more than 6000 Texans in all) indicated that they opposed the Legislature's consideration of congressional redistricting. I am one of eleven Senators who wish to avail myself of the use and protections of the two-thirds Rule in any special session held in 2003 or 2004 so that any congressional redistricting bill cannot be taken up in the Senate. My constituents' interests will be harmed if the protections of the two-thirds Rule are not available in the Senate during any special session held in 2003 or 2004.

5. Nine of the members of the Texas Senate are minority group members: seven are Hispanics and two are African-Americans. Two other Senators, though Anglo, represent majority-minority districts. The unavailability of the two-thirds Rule in any special session in 2003 or 2004 is intended to have, and will in fact have a discriminatory result on minority voters and officeholders on account of their race, color, or membership in a language minority group.

I declare under penalty of perjury that the foregoing information is true and correct.

/s/ Gonzalo Barrientos
GONZALO BARRIENTOS

Dated: 7/8/03

Supreme Court, U.S.
FILED
MAR 18 2004
OFFICE OF THE CLERK

(2)

No. 03-756

In the Supreme Court of the United States

GONZALO BARRIENTOS, *et al.*,
Appellants,
v.
STATE OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

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QUESTION PRESENTED

Whether the district court properly denied Appellants' motion for injunctive relief to prevent the Texas Senate from considering or voting upon a congressional redistricting bill without first submitting the existing internal legislative procedures of the Senate to the Department of Justice for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

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In the
Supreme Court of the United States

GONZALO BARRIENTOS, *et al.*,
Appellants,

v.

STATE OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

The relief sought by Appellants in the court below—an injunction prohibiting the Legislature from considering or adopting any congressional redistricting plan prior to Department of Justice preclearance of the Texas Senate's internal procedures—is today fundamentally irrelevant. Accordingly, pursuant to Supreme Court Rule 18.6, the State of Texas, Texas Governor Rick Perry, and Texas Lieutenant Governor David Dewhurst (collectively "the State") move to dismiss this appeal on the ground that it is moot, for four separate reasons.

First, the legislative sessions in question, the Second and Third Called Sessions of the 78th Texas Legislature, have expired. *Second*, the Legislature has already passed, and the Governor has already signed into law, congressional redistricting. Indeed, primary elections have already occurred under that plan, and candidates are busy campaigning for the general election. *Third*, Appellants' questions presented are hypothetical, never became ripe, and are now moot, because there was never in fact a special procedure in the Texas Senate made applicable only to redistricting.

And *fourth*, and most critically, after enactment, the congressional redistricting plan was in fact submitted to the Department of Justice, and, on December 19, 2003, the Department precleared the plan in its entirety. Thus, the only relief Appellants could have conceivably obtained—submission for Department of Justice preclearance—has already occurred.

In the alternative, the State moves to summarily affirm the judgment rendered by the three-judge court on the ground that the questions presented are so insubstantial as not to warrant further argument. SUP. CT. R. 18.6. Appellants alleged that the Texas Senate impermissibly altered its "2/3 Rule" with respect to congressional redistricting and that that alteration required prior preclearance by the Department of Justice. The court below correctly rejected that claim. As a matter of law, (1) there was no "2/3 Rule" in the Texas Senate, (2) the Senate's practices did not change, and (3) even had the State of Texas both had such a Rule and changed it during the course of redistricting, that change would not require preclearance because the change was not "enacted" and is not a change "affecting voting" within the meaning of the Voting Rights Act of 1965, under this Court's direct holding in *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992). Moreover, the Department of Justice expressly determined that the internal legislative procedures used to consider redistricting did not themselves require prior preclearance, and that determination is entitled to "considerable deference" by the courts.

STATEMENT OF THE CASE

The Jurisdictional Statement substantially mischaracterizes the events leading up to the enactment of congressional redistricting legislation in 2003. *See* J.S., at 2-9.[1] Appellants' entire argument is predicated on an alleged change to a "2/3 Rule" of the Texas

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1. Appellants' Jurisdictional Statement will be cited as "J.S."

Senate, yet nowhere do the Texas Senate Rules require a supermajority vote to pass a redistricting bill.[2] *See* TEX. S. RULE 16.08(4)-(5) (App., at 37a). Indeed, the Jurisdictional Statement is bereft of *any* citation to *any* textual reference that even alludes to a supermajority requirement in the context of redistricting legislation.[3] The only provisions of the Texas Constitution cited by Appellants expressly require supermajorities only for other, wholly unrelated actions taken by the Senate as a body.[4] *See* J.S., at 8 n.3.

A. The Senate Rules Contain No "2/3 Rule."

This litigation arose after Texas Governor Rick Perry convened a Second Called Session of the Texas Legislature commencing on July 28, 2003. Instead of conducting the business of the State of Texas as they were elected to do, that same day, eleven Senators

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2. As a matter of terminology, when Appellants' Jurisdictional Statement uses the proper noun "Rules," it rarely is referring to the actual Senate Rules that govern the Texas Senate, but rather to "rules" in the generic sense. For example, the Jurisdictional Statement says that "the State changed the Rules" in the course of redistricting, *see* J.S., at 3, but in fact no changes were made to the Senate Rules.

3. The absence of such a textual basis is especially significant because the Senate Rules provide that, as a matter of state law, those Rules and the Texas Constitution are "the only requirements binding on the Senate, notwithstanding any other requirements expressed elsewhere in statute." TEX. S. RULES, preamble (App., at 29a).

4. The U.S. Constitution contains similar two-thirds requirements for specified Senate votes. *See* U.S. CONST. art. I, §7 (to override a veto); *id.*, art. II, §2 (to ratify a treaty); *id.*, art. V (to propose an amendment). These provisions have never been interpreted as requiring a two-thirds vote for the U.S. Senate to pass legislation generally, or to require a supermajority vote of the U.S. Senate to take actions that are wholly unrelated to those expressly specified.

fled to New Mexico, denying a quorum and shutting down the Texas Senate.

During this Second Called Session, Lieutenant Governor David Dewhurst—the President and presiding officer of the Texas Senate—stated that he would not attempt to place a so-called "blocker bill" ahead of other legislation. Under ordinary Texas Senate Rules, Senators consider bills on the Senate floor in the order that they emerge from committee. *See* TEX. S. RULE 5.12 (App., at 33a). That is the Senate's regular order of business. To consider a bill "out of its regular calendar order," the rules require that two-thirds of the Senators present must agree to suspend the regular order of business. *See* TEX. S. RULE 5.13 (App, at 33a).

In the past, an inconsequential bill has often—though not always—been filed by a Senator early in the legislative session. The Lieutenant Governor may then choose quickly to refer it to a committee, so that it can be voted out by that committee and placed atop the Senate's intent calendar, which determines order of business on the floor. *See* TEX. S. RULE 5.12 (App., at 33a). Because the Senate Rules provide that bills will be placed on the order of business in the order in which they are voted out of committee, having such a bill at the top of the intent calendar forces lawmakers who wish to take up another bill either (1) to vote out or otherwise dispose of the purported "blocker bill" or (2) to obtain support from two-thirds of the Chamber to suspend the regular order of business. This bill atop the calendar is referred to as a "blocker bill" because it blocks any other legislation from being debated unless two-thirds of the Senators present support doing so.[5]

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5. Additionally, there is an exception to the calendar Rules described above, unmentioned by the Appellants, pertaining to House Bills. Because the Senate's regular order of business places all House bills at the back of the line, behind both any "blocker bill" and any other

This tradition has not always been followed in the Texas Senate and, in fact, there have been numerous occasions when various Lieutenant Governors have declined to use a "blocker bill" during a Called Session.[6] Nevertheless, Appellants contend that having to vote to suspend the "regular order of business" is, in every instance, the regular order of business in the Texas Senate. *See* J.S., at 4. But the use of a "blocker bill" is not grounded in, much less mandated by, any constitutional or statutory provisions or Rules enacted by the Texas Senate, nor is it used by the Texas House. It is purely a legislative calendar-management tool sometimes utilized through the discretion of the Lieutenant Governor, committee members, and other Senators to control the flow of legislation to the Senate floor and to manage the day-to-day affairs of the Senate. No one person alone may control the use of a blocker bill: its use depends on (1) a Senator's introducing a bill intended to be used as a blocker; (2) the Lieutenant Governor's quickly referring the bill to committee; (3) the committee's quick reporting of the bill; and

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Senate Bills, the Senate Rules provide for "House bill days" on Wednesday and Thursday of each week during which House bills have priority. TEX. S. RULE 5.10 (App., 32a). On those House bill days, "House Joint Resolutions and House bills on special order and on second and third readings, respectively, and House Concurrent Resolutions shall be taken up and considered until disposed of . . . ." *Id.* Thus, on such a House bill day, all Senate bills—including any Senate blocker bill—are at the back of the line. *Id.*; *see also* App., at 40a.

6. Several examples of the Texas Senate proceeding to a vote in a special session without having in place a "blocker bill" are contained in the Affidavit of Patsy Spaw, Secretary of the Texas Senate. *See* App., at 41a. In particular, the examples in that affidavit reflect the state of the Texas Senate in the 55th, 57th, 59th, and 63rd Texas Senate, *id.*—both immediately before and immediately after the 1972 reference date for Texas under the Voting Rights Act.

(4) the Lieutenant Governor's and Senate's continuing to decide not to take up the "blocker bill" for a vote.

While in New Mexico, on August 11, 2003, Appellants filed this §5 enforcement claim alleging that Lieutenant Governor Dewhurst's decision not to pursue the use of a "blocker bill" concerning congressional redistricting was a violation of §5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. *See* J.S., at 7a-25a.

B. The Department of Justice Determined That Internal Legislative Procedures Do Not Require Preclearance.

On August 15, 2003, the State asked the Department of Justice for clarification pursuant to 28 C.F.R. §51.35 (App., at 12a) as to whether preclearance was required before the Senate could act without using a "blocker bill." App., at 1a-11a. That submission also, in the alternative, presented that practice to the Attorney General for expedited preclearance. *Id.*, at 2a, 10a-11a.

On August 26, 2003, the Attorney General responded that "the practice in question is an internal legislative parliamentary rule or practice—not a change affecting voting—and, therefore, is not subject to the preclearance requirement of Section 5." App., at 13a. The Attorney General continues, "[W]hen a new redistricting plan is actually adopted by the Texas Legislature . . . the Attorney General will review the entire proposed plan *and the process by which it has been adopted* to ensure that the submitted changes have neither a discriminatory purpose nor a discriminatory effect." *Id.*, at 14a (emphasis added).

C. The Three-Judge Court Dismissed Appellants' Claims.

Following extensive briefing and argument, the district court declined to grant the injunction requested by Appellants and instead dismissed their claims. J.S., at 1a-4a. The three-judge court concluded that "[t]he United States Supreme Court decision in *Presley v. Etowah County* . . . controls this case" because

Appellants challenged only the internal "distribution of power between legislators," which only indirectly affects voting. J.S., at 2a. "In the instant case, what will directly affect the voters of this State is a redistricting bill, not the mere consideration of such a bill or the process by which it comes to the floor of the Texas Senate." J.S., at 2a.[7]

D. The Texas Legislature Enacted Congressional Redistricting.

After the three-judge court denied their injunction, Appellants sought no interim relief from this Court. Instead, when the Governor called a Third Called Session, they returned to the floor of the Texas Senate to debate congressional redistricting.

Following extensive and often heated debate, the Texas Legislature passed, and Governor Perry signed into law, a congressional redistricting plan, which originated not as a Senate

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7. Although the district court dismissed Appellants' then-pending §5 and related claims, it expressly withheld ruling on their pending motion to amend their Complaint to assert additional constitutional claims. J.S., at 3a-4a; *accord* App., at 21a (Appellants: noting that "[u]ntouched by the Court's September 12th order was the Senator's [sic] motion for leave to file a first amended complaint"). Therefore, Appellants' September 22, 2003, notice of appeal was interlocutory, specifying that it challenged only the three-judge court's September 12, 2003, denial of a preliminary injunction. *See* J.S., at 5a-6a; *accord* App., at 21a (Appellants: "The Senators appealed the preliminary injunction denial on September 22, 2003, and filed their jurisdictional statement with the Supreme Court of the United States on November 21, 2003.").

It was not until January 22, 2004—long after the notice of appeal in this case—that the district court denied as moot Appellants' motion to amend and entered a final judgment. App., at 25a-28a. Appellants filed no notice of appeal from that final judgment, and consequently the only issue properly before this Court is the denial of the preliminary injunction.

bill, but rather in the House as H.B. 3.[8] A companion House bill, H.B. 1, also changed election dates "to allow for the use of the districts established by [H.B.3], in the 2004 general primary election . . . ."[9] Pursuant to the Governor's call of the Legislature, *see* TEX. CONST. art III, §40, the Texas Senate also considered a number of other subjects during the Third Called Session, succeeding in enacting several of them into law. Included among these were H.B. 2, which modified Texas law regarding the construction of highways and other traffic laws, and H.B. 7, which provided for reorganization of certain agencies of state government.[10]

E. The Department of Justice Precleared the Texas Congressional Redistricting Legislation.

After enactment, the State submitted the congressional redistricting legislation for preclearance, and, on December 19, 2003, the Department of Justice precleared the legislation in its entirety. App., at 16a-17a.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE NOW MOOT.

The three-judge court correctly denied Appellants' request for an injunction under §5 of the Voting Rights Act. J.S., at 1a-4a; *see also* Part II, *infra*. Nevertheless, this appeal should be dismissed as moot because it no longer presents a live controversy.

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8. Act effective Jan. 11, 2004, 78th Leg., 3d C.S., ch. 2, Art. 1-3, 2003 Tex. Sess. Law Serv. 3.

9. Act effective Jan. 11, 2004, 78th Leg., 3d C.S., ch. 1, §6, 2003 Tex. Sess. Law Serv. 2.

10. *See, e.g.*, Act effective Jan. 11, 2004, 78th Leg. 3d C.S., ch. 8, Art. 1-6, 2003 Tex. Sess. Law Serv. 115; Act effective Jan. 11, 2004, 78th Leg., 3d C.S., ch. 3, Art. 1-34, 2003 Tex. Sess. Law Serv. 78.

A. The Second and Third Called Sessions of the 78th Texas Legislature Have Already Expired.

Appellants' claims are moot because they seek to alter the procedures to be used in sessions of the Texas Legislature that have already passed into history. The Complaint was filed during the Second Called Session of the 78th Legislature and was litigated in terms of what was expected to happen during an anticipated Third Called Session. On September 12, 2003, the district court denied Appellants' request for an injunction, and Appellants sought no emergency relief from this Court pending appeal.

Thereafter, the Governor did, in fact, call a Third Called Session on September 15, 2003. Under the Texas Constitution, special sessions are limited by law to a maximum term of thirty days, *see* TEX. CONST. art. III, §40; its work done, the Texas Senate ended the Third Called Session on October 12, 2003. Because both sessions have expired, Appellants' claims for injunctive relief concerning the procedures in place in the Second and Third Called Sessions are now moot.

B. The Case Is Moot Because Redistricting Legislation Has Already Been Enacted, and Elections Have Already Occurred.

Appellants' claims challenged the legislative procedures in place for the consideration of congressional redistricting and sought injunctive relief against those legislative procedures that they found objectionable. In particular, Appellants' sought an affirmative injunction to prevent congressional redistricting from being considered at all on the floor of the Senate. *See* J.S., at 23a-24a.

But congressional redistricting has already passed. It was debated, voted out of committee, approved by the House, approved by the Senate, and signed by the Governor. It has already gone into effect, and primary candidates have already won and lost under the new plan.

At this stage—after redistricting has been considered, debated, and adopted—a claim for injunctive relief against the initial consideration of redistricting by the Texas Senate is altogether moot.[11]

C. Ultimate Preclearance of the Redistricting Legislation Necessarily Moots Any §5 Controversy That May Have Existed.

The Department of Justice has made two important determinations in this case, the first of which is entitled to "considerable deference" on the merits and the second of which is entirely controlling and renders this appeal moot.

On August 26, 2003, the Department, in response to a request for clarification pursuant to 28 C.F.R. §51.35 (App., at 12a), squarely addressed the gravamen of Appellants' claim. The Attorney General concluded that the decision whether or not to use a "blocker bill" is "an internal legislative parliamentary rule or practice—not a change affecting voting—and, therefore, is not subject to the preclearance requirement of Section 5." App., at 13a.

The Attorney General's determination that the Texas Senate's use of a "blocker bill" *vel non* does not require §5 preclearance is entitled to "considerable deference." *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178-179 (1985) ("[T]he

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11. Nor is this case one where traditional notions of mootness and ripeness should be subordinated to concerns that the claim is capable of repetition yet evading review. Both the Department of Justice and a three-judge federal district court have already reviewed and upheld the legality of the ultimately-passed plan and the processes used to adopt that plan. *See* App., at 14a, 16a-17a; *Session v. Perry*, 298 F. Supp.2d 451 (E.D. Tex. 2004) (three-judge court). And the possibility that this dispute might occur again in the future is utterly speculative. *See Texas v. United States*, 523 U.S. 296, 300 (1998) (holding that a §5 claim was not yet ripe because "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all").

construction placed upon [§ 5 of the Voting Rights] Act by the Attorney General . . . is entitled to considerable deference."); *see also* Part II.D, *infra*.

In its August 26 decision letter, the Department expressly noted that "when a new redistricting plan is actually adopted by the Texas Legislature . . . the Attorney General will review the entire proposed plan *and the process by which it has been adopted* to ensure that the submitted changes have neither a discriminatory purpose nor a discriminatory effect." App., at 14a (emphasis added).

Hence, the second relevant determination by the Department of Justice occurred on December 19, 2003. At that time—after the congressional redistricting plan had been considered, debated, adopted, and submitted for preclearance—the Department of Justice determined that the "plan and the process" did not retrogress minority voting rights and so precleared the plan in its entirety. App., at 14a, 16a-17a.

Unlike the Department's August 26 determination, which is entitled merely to "considerable deference," the December 19 preclearance—of both the "plan and the process"—is entirely conclusive.[12]

Once the Attorney General has made a determination of non-retrogression under §5, the Voting Rights Act provides no role for the courts to second-guess that determination. *Morris v. Gressette*, 432 U.S. 491, 507 (1977) ("[That decision] cannot be questioned in a suit seeking judicial review of the Attorney General's exercise of

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12. Indeed, there is an argument that, under the plain terms of the statute, any §5 claim with respect to the "2/3 Rule" became moot even earlier—60 days after the State's initial August 15 submission, once the Attorney General declined to interpose an objection. *See* 42 U.S.C. §1973c ("[S]uch . . . practice . . . may be enforced . . . if the . . . practice . . . has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . .") (J.S., at 27a).

discretion under § 5."); *id.*, at 503, 504-05; *Allen v. State Board of Educ.*, 393 U.S. 544, 549-50 (1969).

Even if they had prevailed in the district court, the only remedy Appellants could have obtained was an injunction requiring the State to obtain Department of Justice preclearance. That preclearance having been already granted, this case is moot.

D. Appellants' Questions Presented Never Became Ripe, and Are Now Moot, Because There Was Never a Special Procedure in the Texas Senate Made Applicable Only to Redistricting.

Both Questions Presented in the Jurisdictional Statement explicitly presume that a change in internal legislative rules was applicable "solely to [congressional] redistricting legislation." *See* J.S., at i. In accord with that focus, Appellants throughout the Jurisdictional Statement base their argument—including their supposed distinctions of leading cases—on the assertion that the practice they are challenging "applied only to this year's controversial Texas congressional redistricting bill." J.S., at 2; *see also* J.S., at 3 ("only applicable to congressional redistricting legislation"); *id.*, at 8 ("only the rules governing the process for enacting *congressional redistricting* legislation") (emphasis in original); *id.*, at 11 ("solely applicable to redistricting"); *id.*, at 13 ("*the change was made applicable only to congressional redistricting*") (emphasis in original); *id.*, at 14 ("changes applicable only to redistricting"); *id.*, at 15 ("targeted solely to congressional redistricting legislation"); *id.*, at 17 ("changes to redistricting practices and procedures"); *id.*, at 18 ("aimed specifically and solely at congressional redistricting legislation"); *id.*, at 20 ("its . . . only effect, is enactment of a congressional redistricting plan").

But this prediction never came true, and consequently Appellants' claims were unripe then and moot today. *See, e.g., Texas*, 523 U.S., at 300 (holding §5 challenge not ripe because it was uncertain whether particular rule would actually be invoked);

Alexander v. City of Pearland, 945 F. Supp. 1069, 1070 (S.D. Tex. 1996) (refusing to issue §5 injunction or even request three-judge court because the enactment in question was not finalized and thus "the Court is unpersuaded that there is a justiciable issue under section 5").

A wide variety of legislation was considered prior to the expiration of the Third Called Session, and the Senate's calendar rules applied evenhandedly to all of it. The Senate calendar had no "blocker bill" applicable to *any* of the legislation that the Senate considered. Nor was a supermajority otherwise required for the passage of the bills considered during that session. Among the other laws enacted during the session were bills affecting the construction of highways and bills that provided for reorganization of several agencies of state government. *See, e.g.*, Act effective Jan. 11, 2004, 78th Leg. 3d C.S., ch. 8, Art. 1-6, 2003 Tex. Sess. Law Serv. 115; Act effective Jan. 11, 2004, 78th Leg., 3d C.S., ch. 3, Art. 1-34, 2003 Tex. Sess. Law Serv. 78. The Appellants' fears that the Senate would use a special procedure applicable "solely to redistricting legislation," as suggested in the Questions Presented, proved unfounded. J.S., at i.[13]

This appeal therefore hinges on a counterfactual premise about how the Third Called Session was conducted. Thus, even were this Court now to adjudicate what would happen if a rule change were made "solely applicable to redistricting," J.S, at 11, that guidance would be merely advisory to the parties because the 78th Texas Legislature did no such thing. For all these reasons, this Court should dismiss the appeal as moot.

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13. Moreover, their supposition that a Senate "blocker bill" would necessarily prevent the consideration of redistricting without a 2/3 majority also proved incorrect, as the bill that ended up passing in the Third Called Session was a House bill, which can come up for Senate consideration independently of any pending Senate "blocker bills." *See* note 5, *supra*.

II. THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL AND THE COURT SHOULD SUMMARILY AFFIRM.

If the Court were to reach the merits of this appeal, it should summarily affirm the denial of the injunction and the dismissal of Appellants' claims because: (1) Texas does not have a "2/3 Rule"; (2) the procedures under which the Senate considers bills have not changed; (3) any change in the Senate Rules, had one occurred, would be internal to a legislative body, not an "enactment," and not "with respect to voting" under the Voting Rights Act; and (4) the Attorney General's conclusion that such internal practices fall outside of the preclearance process is entitled to "considerable deference," and his subsequent determination that the Texas redistricting plan did not retrogress minority voting rights is conclusive.

A. Texas Does Not Now Have, and Has Never Had, a "2/3 Rule" with Respect to Redistricting Legislation.

Under §5 of the Voting Rights Act, preclearance is required only if a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting [is] different from that in force or effect on November 1, 1972." 42 U.S.C. §1973c. In order to determine whether there has been such a change, one must compare the current practice with the practice in place at the time the State became covered by the Voting Rights Act. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 495 (1992) ("To determine whether there have been changes with respect to voting, we must compare the challenged practices with those in existence before they were adopted."). In Texas, the relevant date for comparison is November 1, 1972—the date that Texas became a covered jurisdiction under the Voting Rights Act. 42 U.S.C. §1973b(b).

Appellants have consistently maintained a studied ambiguity as to what new Senate "Rule" they are contending must be precleared by the Department of Justice. They have never quoted the text of any such rule, in the Senate Rules or elsewhere. Nor have they pointed to any uniform practice, before or after 1972.

Specifically, in order to state a claim, Appellants must have alleged facts showing (1) what practice was in existence on November 1, 1972, and (2) what current changed practice they are challenging. The Appellants did neither. The Appellants never clearly stated what practice they were challenging, alternatively focusing on "blocker bills" and various other legislative supermajority requirements (which they sometimes refer to as the "2/3 Rule"). But neither requirement clearly existed in Texas in 1972. The terms "blocker bill" and "2/3 Rule" appear nowhere in the Senate Rules or Texas Constitution, in general or in the specific context of redistricting. They do not exist.

B. Senate Practice Has Not Changed.

Appellants' failure to point to a specific practice or procedure that was in force or effect on November 1, 1972, the relevant date for determining whether there has been a change in procedure, also means that they failed to demonstrate that any Senate practice has changed.

The Senate did use "blocker bills" with some frequency before 1972, but never *required* that a "blocker bill" be used before considering any legislation, much less redistricting legislation in particular. For example, prior to 1972, "blocker bills" were not used in the First Called Session of the 59th Legislature, the Second Called Session of the 57th Legislature, and the Second Called Session of the 55th Legislature. *See* App., at 41a. Because the Senate did not have a "blocker bill" during those Sessions, the Senate needed no 2/3 vote in order to suspend the regular order of business. Bills were simply considered consecutively in the order in which they were voted out of committee. *Id.*

Furthermore, even on those occasions when a "blocker bill" may have been used, a failure to get a two-thirds majority to suspend the regular order has not precluded the Senate from disposing of "blocker bills" so that another desired bill could be taken up on a simple majority vote. In 1968, under Lieutenant Governor Preston Smith, an attempt was made to suspend the

regular order of business to bring up H.B. 2, a tax bill, on second reading. *See* App., at 40a. When the motion to suspend failed 14 to 16, the bill was still brought up on a subsequent day without a two-thirds suspension vote. *Id.* Similarly, bills that might otherwise have served as "blocker bills" were disposed of in 1961 to allow passage of legislation relating to the Texas Liquor Control Act to be taken up without a two-thirds vote. *Id.*

In the years following 1972 until today, the same intermittent use of "blocker bills" has occurred. No blocker bills were used in the Third Called Session of the 72nd Legislature, the First Called Session of the 65th Legislature, or the First Called Session of the 63rd Legislature, and consequently no two-thirds vote to suspend the order of business was taken. App., at 41a.

Historically, because redistricting can be so politically divisive, it often fails to pass during the regular biennial session of the Texas Legislature, instead necessitating a special called session of the Legislature.[14] The Texas Legislature meets for a 140-day "regular session" only once during its two-year term. *See* TEX. CONST. art. III, §§5(a), 24(b). Any other meeting of the Legislature requires that it be called into "special session" by proclamation of the Governor. *Id.*, art. III, §§5(a), 40. In such a special session, "there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session, or presented to them by the Governor; and no such session shall be of longer duration than thirty days." *Id.*, §40. Given that limited scope and limited duration, as Appellants' expert below expressly acknowledged, a "blocker bill . . . is often not used in [s]pecial [s]essions." J.S., at 37a.

Indeed, although use of a blocker bill has varied, from the 1971 congressional redistricting until the present, never has a final

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14. In 2003—as in 1971, 1981, and 1991—the regular session of the Texas Legislature did not pass congressional redistricting legislation, but a special session of the Legislature did. J.S., at 48a-51a.

congressional redistricting map been favored by two-thirds of the Senate, but instead each time was ultimately favored by merely a majority.[15] In 1971, the Texas Senate approved the final redistricting map—after it returned from a conference with the House—by a vote of 17 in favor, 9 opposed, and one "paired vote."[16] In 1981, the Texas Senate approved the final redistricting map by a vote of 18-13.[17] In 1991, the Texas Senate passed redistricting legislation by a vote of 18-13. J.S., at 50a. And in 2003, the ultimate redistricting-related legislation passed by votes of 19-12 (election date changes) and 17-14 (district boundary changes).[18]

In sum, Appellants have not pointed to any change in the practices and procedures of the Senate before or after 1972. Under Senate practice, the use of "blocker bills" was allowed, but not required, under Senate Rules prior to 1972 and is allowed, but not required, under the Senate Rules today.

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15. That there was not a supermajority in support of the final congressional redistricting plan in 1971, 1981, and 1991 is all the more remarkable because, in those years, the Texas Senate was dominated by a single political party that held more than two-thirds of the seats. In 1971, the Senate had 29 Democrats and 2 Republicans. In 1981, the Senate had 23 Democrats and 7 Republicans. And in 1991, the Senate had 22 Democrats and 8 Republicans. *See* Members - Session Statistics for the Texas Legislature, *on file with* Texas Legislative Reference Library.

16. *See* Act effective Sept. 3, 1971, 62d Leg., 1st C.S., ch. 12, §§1-30, 1971 Tex. Gen. Laws 38, 41.

17. *See* Act effective Nov. 10, 1981, 67th Leg., 1st C.S., ch. 2, Art. 1-4, 1981 Tex. Gen. Laws 37, 42.

18. *See* Act effective Jan. 11, 2004, 78th Leg., 3d C.S., ch. 1, §§1-7, 2003 Tex. Sess. Law Serv. 1, 3; Act effective Jan. 11, 2004, 78th Leg., 3d C.S., ch. 2, Art. 1-3, 2003 Tex. Sess. Law Serv. 3, 77.

C. The Procedures Were Not "Enacted" and Are Not "With Respect to Voting."

The panel below correctly concluded that the Appellants presented an "insubstantial" claim because any change that occurred is not one "with respect to voting." The decision not to utilize a "blocker bill" is not a voting qualification or prerequisite to voting for the general electorate, nor a standard, practice, or procedure with respect to voting for the general electorate.

This Court has held that §5 "is unambiguous with respect to the question of whether it covers changes other than changes in rules governing voting. It does not." *See Presley*, 502 U.S., at 509. In *Presley*, this Court held that changes that concern only the routine, internal operations of an elected body and the distribution of power among officials are not subject to §5 because such changes have no direct relation to, or impact on, voting by the electorate. *See id.*, at 506. As the panel below noted, *Presley* "controls this case." App., at 2a. Under *Presley*, the decision not to utilize a "blocker bill" is not a covered change that falls under §5, and therefore did not require preclearance.

As *Presley* explained, §5 is triggered by changes in standards, practices or procedures that actually pass, *i.e.*, that are formally adopted by a Legislature or other governmental body.[19] The Lieutenant Governor's discretionary decision not to attempt to place a "blocker bill" ahead of other legislation in the Texas Senate is not such a change. That is because the Voting Rights Act protects *voters*, not *legislators*, and in particular the ability of voters to exercise their vote. Changes in voting practices and procedures are

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19. Appellants attempt to distinguish *Presley* primarily on the ground that *Presley* did not involve a "change [that] was *made applicable only to congressional redistricting*." J.S., at 13 (emphasis in original). Of course, neither was the procedure at issue in this case; the choice not to employ a "blocker bill" applied uniformly to all legislation considered during the Third Called Sesssion, including matters completely unrelated to redistricting. *See* Part I.D, *supra*.

not able to affect the ability of voters (as opposed to legislators) to vote until they are actually enacted. In the absence of a legislative enactment, §5 is generally not triggered because the rights of voters are not affected. As the panel below properly held, "what will directly affect the voters of this State is a redistricting bill, not the mere consideration of such a bill or the process by which it comes to the floor of the Texas Senate." App., at 2a.

Appellants assert a change in the unwritten and informal deliberative tactics used strategically by legislators from time to time. But such tactics simply do not come within the ambit of the Voting Rights Act. By its terms, Section 5 applies only when "a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. §1973c.

Shifting tactics within the legislative arena cannot fairly be described as the State "enact[ing] or seek[ing] to administer" a change. *Id.*; *see also Branch v. Smith*, 538 U.S. 254, 264 (2003). As the Court made clear in *Lopez v. Monterey County*, 525 U.S. 266 (1999), the word "seek" in the context of §5 should be

> "understood as creating a temporal distinction. The Government has indicated that a covered jurisdiction need not seek preclearance before *enacting* legislation that would effect a voting change. Preclearance is required before actually *administering* a change, however, and use of the word 'seek' in § 5 makes this distinction clear." *Id.*, at 279 (emphasis in original) (internal cites omitted).

This "temporal" distinction excludes from preclearance those matters preliminary to the final act that effects the change in voting. Thus, the preliminary strategies employed by legislators on the Senate floor are not covered "enact[ments]" of legislation—they are merely preliminary to legislation, not "the product of legislation." *Branch*, 538 U.S. at 264.

Indeed, the statute dovetails with the Department of Justice's promulgated policy of refusing to consider submissions before they become "final enactment[s] or administrative decision[s]." 28 C.F.R. §51.22(a) (App., at 15a); *see also Lopez*, 525 U.S., at 279 (citing 28 C.F.R. §51.22(a)). In short, a State does not seek to administer a change until that changed has been enacted.

There are a myriad of legislative decisions—which Senators are named committee chairs, to which committees bills are referred, which Senators are recognized on the floor, which parliamentary procedures are employed to advance or hinder a bill's passage—that are carried out daily in every legislature. Many, if not most, of these decisions will have some impact at some point on whether or not a particular redistricting plan is adopted. They do not trigger §5 because, under *Presley*, they affect merely the internal governance of the elected body, not the rights of individual voters. Any contrary ruling could essentially shut down the state legislature in Section 5-covered states, as literally thousands of decisions would have to be submitted to the Department of Justice for preclearance. This Court roundly rejected such an outcome in *Presley*. As this Court explained, the term "voting" in §5 cannot reach into every internal crevice of government because:

> "in a real sense every decision taken by government implicates voting. This is but the felicitous consequence of democracy, in which power derives from the people. Yet no one would contend that when Congress enacted the Voting Rights Act it meant to subject all or even most decisions of government in covered jurisdictions to federal supervision." *Id.*, at 504.

Or as one federal district judge explained:

> "It is true that changes in the various legislative delegations' rules might affect the distribution of power among officials and certain officials might have more or less authority after the changes. It is also true that the value of a citizen's vote may be diminished when his elected representative has less

> authority. Nevertheless, *the Supreme Court has clearly, unmistakably and explicitly held that such changes in internal rules and procedures do not raise a Voting Rights Act preclearance issue.*" *DeJulio v. Georgia*, 127 F. Supp. 2d 1274, 1302-03 (N.D. Ga.) (emphasis added), *aff'd in part, rev'd on other grounds*, 276 F.3d 1244 (CA11 2001).

For the Act to have a meaningful boundary, the scope of "voting" must be confined to final legislative acts that directly affect voting by the general population.

Because the pre-enactment strategies of particular legislators are neither "enact[ments]" nor can they be said to be "seek[ing] to administer" a change within the text of §5, they fall outside of the preclearance requirement.[20] Each enactment should be precleared exactly once—after it is final—to maximize efficiency for all concerned, allowing the Attorney General to focus his review on

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20. Appellants offer two hypotheticals that they believe present more compelling circumstances than the facts in this case. *See* J.S., at 15-16. First, they suppose an express Texas constitutional amendment, altering the rules for a legislative quorum for the single purpose of considering congressional redistricting. This hypothetical indeed does present a stronger case, because it avoids three of the four merits failings of Appellants' argument. In their hypothetical—unlike in Appellants' case in reality—(1) there was a prior rule (the old constitutional language), (2) there was a change (the new constitutional language), and (3) there was an actual enactment (the passage of the new language). However, even their hypothetical is still not "with respect to voting" because it concerns legislators, not voters, and so under *Presley* still would not require preclearance.

Their second hypothetical supposes a statute that would specify that the votes of minority members of the Texas Senate should not be counted in certain circumstances. This "admittedly outlandish" hypothetical, J.S., at 16, is both offensive on its face and decidedly unhelpful. If such a noxious statute were to pass, §5 preclearance would be altogether irrelevant, because the statute would be facially unconstitutional, and no court would hesitate to immediately so hold.

laws in their final form and allowing the normal state legislative process to take its course without undue interference at each step.[21]

In addition, the rule that §5 does not reach the deliberative legislative process is strongly rooted in notions of federalism. As this Court has explained, the Voting Rights Act has never been interpreted to give the Department of Justice broad supervisory authority over the internal operation of state legislatures. "If federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments." *Presley*, 502 U.S. at 510.

The unrestrained construction of §5 urged in this lawsuit would radically overhaul the operating procedures of the Texas Senate, by mandating in essence that the President of the Texas Senate (the Lieutenant Governor of Texas) cede to federal authorities control over the daily, internal workings of the Senate, no matter what the governing Senate Rules say. Such an overbroad reading would allow federal law to encroach seriously on the internal governing procedures of a sovereign State and dictate how the Senate calendar and daily flow of legislation through the Chamber is conducted. It is hard to imagine processes more fundamental to the sovereignty of States than the ongoing legislative decisions of which bills to introduce, and when, and which bills to pass, and when. An understanding of the Voting Rights Act that allowed federal courts

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21. Appellants cite *Georgia v. United States*, 411 U.S. 526 (1973), for the proposition that "[t]he redistricting process affects voting because," in part, it affects "the opportunity for [voters] and their elected representatives to express their views on the district." J.S., at 17. But *Georgia* does not involve the political process leading up to a particular redistricting map, instead merely reaching the now-uncontroversial holding that "the changes enacted" must be precleared before implementation. *Georgia*, 411 U.S., at 535. With that the State has no dispute; indeed, that preclearance has been sought and denied. App., at 16a-17a.

to intrude into the sovereignty of a State to the level requested by the Appellants in this case would in effect commandeer the machinery of state government, and would raise constitutional problems with the Voting Rights Act itself. *See Printz v. United States*, 521 U.S. 898, 912 (1997) ("We have held . . . that state legislatures are *not* subject to federal direction." (emphasis in the original)); *New York v. United States*, 505 U.S. 144, 179 (1992) ("No . . . constitutional provision authorizes Congress to command state legislatures to legislate."); *see also Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480 (1997) (noting the "serious federalism costs already implicated by §5"). Nothing in this Court's prior caselaw requires or permits such a result.

D. The Department of Justice's Conclusion That the Challenged Practices Do Not Require Preclearance Is Entitled To "Considerable Deference," and Its Subsequent Preclearance of the "Plan and the Process" Behind Congressional Redistricting Is Conclusive.

Even if *Presley* had not held that the Voting Rights Act unambiguously excludes claims such as those asserted by Appellants, the result of this appeal should still be summary affirmance because, as the panel below observed, the Department of Justice's interpretation of §5 is entitled to "considerable deference." App., at 3a. In *Presley*, the Court did not reach the question of administrative interpretation because Congress's intent to exclude internal rules from the scope of §5 was unambiguous. *Presley*, 502 U.S., at 508-09. But if the Court reaches that question here, the Department of Justice has squarely and specifically indicated that no preclearance would be required on these facts.

Before the three-judge court's decision, the Department of Justice determined that the subject matter of this suit was not subject to preclearance. *See* App., at 13a-14a. On August 26, 2003, the Attorney General concluded that "the practice in question [in the Texas Senate] is an internal legislative parliamentary rule or practice—not a change affecting voting—and, therefore, is not subject to the preclearance requirement of Section 5." App., at 14a.

The Attorney General's conclusions are entitled to considerable deference. In interpreting the scope of §5, this Court has "traditionally afford[ed] substantial deference to the Attorney General's interpretation of § 5 in light of [his] 'central role . . . in formulating and implementing' that section." *Lopez*, 525 U.S., at 281 (quoting *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32, 39 (1978)); *see also Presley*, 502 U.S., at 509 ("When the Attorney General makes a reasonable argument that a contested change should be classified as a change in a rule governing voting, we can defer to that judgment."); *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178-79 (1985) ("Any doubt that these changes are covered by § 5 is resolved by the construction placed upon the Act by the Attorney General, which is entitled to considerable deference."); *Perkins v. Matthews*, 400 U.S. 379, 390-91 (1971).

Against this express determination from the Attorney General, Appellants attach a cryptic "printout" purporting to show previous submissions similar to that at issue here. J.S., at 9, 20; *id.*, at Exh. B. To the extent the content and meaning of this printout can be determined at all—and Appellants proffered no evidence before the district court concerning the context or meaning of the many ambiguous entries—the fact that some jurisdictions may have chosen out of an abundance of caution to submit some procedures for preclearance does not demonstrate that such procedures are actually covered by §5. Indeed, no submission discussed by Appellants appears to relate to a change in the rules of a state legislature (and certainly none show a submission by members of that legislature asking whether they can follow existing rules).

In support of their "printout," Appellants cite *Georgia v. United States*, 411 U.S., at 527-28. However, in *Georgia*, unlike here, the Attorney General contended that the type of change—the actual enactment of a redistricting plan—was covered. In such a situation, the Court looked in part to the Georgia's own prior submission of such a plan to indicate that Georgia understood that its enactment of redistricting was a covered change. *Id.*, at 533-34. That situation

is a far cry from the instant case, wherein the Attorney General has determined that there has been no covered change, *see* App., at 14a, and wherein Texas did not submit the change for preclearance without first seeking clarification under 28 C.F.R. §51.35, *see* App., at 1a. Appellants have no basis to argue that the Court should look to a cryptic "printout" to override the express conclusion of the Attorney General—and the clear guidance of this Court—that rules internal to a legislative body are not subject to preclearance.

In any event, once the plan was enacted, the Attorney General reviewed the Texas entire "plan and process" for compliance with the Voting Rights Act, and on December 19, 2003, ruled that the Texas plan was not retrogressive. App., at 16a. In so doing, the Attorney General considered and expressly rejected Appellants' arguments, including their argument that the process used to pass the bill violated the Voting Rights Act. And that preclearance determination is conclusive as a matter of law. *Morris v. Gressette*, 432 U.S. 491, 507 (1977).

E. The District Court Correctly Dismissed Appellants' Section 2 and Constitutional Claims.

In its September 12, 2003, decision, the district court also dismissed Appellants' "claims under §1983, insofar as Plaintiffs claim that the State's decision to consider redistricting legislation and the failure to adhere to the '2/3rd Rule' violate the First, Fourteenth, and Fifteenth Amendments to the United States Constitution." J.S., at 3a. The district court's decision not to grant an injunction on the basis of those theories was correct because they were meritless and substantially interrelated with the §5 issues.[22]

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22. In a single footnote of their Jurisdictional Statement, Appellants suggest that their "Section 2 and constitutional claims" should not have been dismissed "without even affording [them] the right to an evidentiary

Indeed, the district court dismissed those claims only "insofar as" they touched on those overlapping issues. *See* J.S., at 3a.

The merits of a congressional redistricting bill—including its compliance with Section 2 of the Voting Rights Act and with the Constitution—were left for a future court challenge to the final legislation itself. *See* J.S., at 3a ("[It] would thereafter be subject to judicial challenge. However, that time has not yet come.").

The proper forum for such a challenge came *after* the enactment of the final redistricting legislation on October 12, 2003. That same day, an action was filed in the Eastern District of Texas bringing such challenges. In the consolidated trial that followed, dozens of plaintiffs—many closely allied with Appellants and represented by substantially the same counsel—brought a panoply of claims against the substance of and process leading up to congressional redistricting.

After substantial briefing and a two-week trial, the district court denied all the Voting Rights Act and constitutional claims brought against the Texas congressional redistricting legislation. *See Session v. Perry*, 298 F. Supp.2d 451, 515 (E.D. Tex. 2004) (three-judge court). A number of plaintiffs have filed notices of appeal to this Court, and it is expected that they will file Jurisdictional

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hearing." J.S., at 9 n.5. This argument lacks merit. Appellants did not request more time for discovery or the presentation of evidence, through a Rule 56(f) affidavit or otherwise. Had they done so, the district court would have been well within its discretion in denying that request because these claims have no legal basis. Nor have they presented the question in this appeal. It is not within the scope of the Questions Presented. *See* J.S., at i; *see also* SUP. CT. R. 18.3, 14.1(a). And if it had been presented, the ultimate question of dismissal would not fall within this Court's interlocutory jurisdiction over three-judge court injunctions because Appellants failed to preserve the issue on appeal. 28 U.S.C. §1253; *see also* note 7, *supra*.

Statements shortly. Although the State believes that those appeals, too, will warrant summary affirmance, it is only those appeals—and not the pending Jurisdictional Statement in the present case—that provide an appropriate vehicle to consider the merits of the substance of and process behind Texas's redistricting legislation.

The subject matter of the present appeal, by contrast, is merely the propriety of the district court's denial of the preliminary injunction sought before the Third Called Session. It does not provide a record on which to resolve any disputes about the merits of Texas's redistricting plan or the method by which it was ultimately adopted—both of which came to fruition *after* the district court decision challenged in this appeal. *See* J.S., at 5a-6a (appealing only the September 12, 2003 decision).

CONCLUSION

The Court should dismiss the appeal as moot or, in the alternative, summarily affirm the judgment of the three-judge court. SUP. CT. R. 18.12.

Respectfully submitted,

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March 2004

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APPENDICES

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Appendix A

Geoffrey S. Connor
ASSISTANT SECRETARY OF STATE
State of Texas

Mr. Joseph D. Rich
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Voting Section, 1800G
Washington, D.C. 20530

Re: Applicability of Section 5 of Voting Rights Act

Dear Mr. Rich:

The State of Texas seeks clarification pursuant to 28 C.F.R. §51.35 as to whether a discretionary decision by the Texas Lieutenant Governor not to (1) attempt to place a so-called "blocker bill" ahead of other legislation or (2) otherwise require a two-thirds supermajority vote to take up congressional redistricting legislation on the floor of the Senate during this Second or any subsequent Called Session is a change "with respect to voting" that requires preclearance under Section 5 of the Voting Rights Act of 1965, as amended. As discussed herein, the State of Texas does not believe that any such parliamentary and operational decision—one that concerns the internal, day-to-day working of the Texas Senate—is subject to Section 5 preclearance.[1] In short, there is no "two-thirds

[1] Of course, the State of Texas does not dispute that in the event a redistricting plan is passed by the Legislature, the actual redistricting plan itself would be subject to prelearance and would be submitted.

rule," the Senate practice has not changed, and, in any event, the procedures are not "with respect to voting." However, should the United States Department of Justice disagree, then please accept this letter as the State's written request for expedited administrative preclearance, pursuant to 28 C.F.R. §51.34.

Facts

Texas Governor Rick Perry convened a Second Called Session of the Texas Legislature commencing on July 28, 2003, for the purpose of considering legislation relating to: (1) congressional redistricting; (2) certain transportation-related issues; (3) state finance issues, including adjustments to school district fiscal matters; (4) certain election-related issues; and (5) reorganization and reform measures applicable to state government. This Second Called Session ends by law on August 26, 2003.

During this Second Called Session, Lieutenant Governor David Dewhurst—the President and presiding officer of the Texas Senate—has declared that he will not attempt to place a "blocker bill" ahead of other legislation. Under ordinary Texas Senate rules, Senators consider bills on the Senate floor in the order they emerge from committee. *See* TEX. S. RULE 5.12 (Texas Senate Rules, at Attachment A). That is the Senate's regular order of business. To debate a bill "out of its regular calendar order," the rules require that two-thirds of the Senators present must agree to suspend Rule 5.12 in order to consider the bill. *See* TEX. S. RULE 5.13. In the past, an inconsequential bill has often—though not always—ben filed by a Senator early in the legislative session. The Lieutenant Governor may then quickly refer it to a committee, so that it can be voted out by that committee and placed atop the Senate's intent calendar, which determines its order of business on the floor. Because the Senate Rules determine the order of business, and provide that bills will be placed on the order of business in the order in which they are voted out of committee, having such a bill at the

top of the intent calendar forces lawmakers either (1) to vote out or otherwise dispose of the purported "blocker bill" or (2) to obtain support from two-thirds of the Chamber to suspend the regular order of business and take up another bill first. This bill is often referred to as a "blocker bill" because it blocks any other legislation from being debated unless two-thirds of the Senators present support doing so.

This tradition has not always been followed in the Texas Senate and, in fact, there have been numerous occasions when various Lieutenant Governors have declined to use a "blocker bill" during a Called Session. It should be noted that the "blocker bill" is not grounded in, much less mandated by, any constitutional or statutory provisions or rules enacted by the Texas Senate, nor is it used by the Texas House. It is purely a legislative calendar-management tool utilized through the discretion of the Lieutenant Governor, committee members, and other Senators to control the flow of legislation to the Senate floor and to manage the day-to-day affairs of the Senate. No one party alone may control the use of a blocker bill: its use depends on (1) a Senator's introducing a bill intended to be used as a blocker; (2) the Lieutenant Governor's quick referral of the bill to committee; (3) the committee's quick reporting of the bill; and (4) the Lieutenant Governor's and Senate's ongoing decision not to take up the "blocker bill" for a vote.

Blocker bills have been used inconsistently by the Texas Senate. Legislation has been passed many times without the use of either a blocker bill or a two-thirds supermajority vote both before and after November 1, 1972. *See* Affidavit of Patsy Spaw, Secretary of the Senate (Attachment B)

On August 11, 2003, 11 of the State's 31 Senators ("the Laredo plaintiffs") filed a Section 5 enforcement claim in federal district court in Laredo, Texas on the erroneous assumption that the Texas Lieutenant Governor's decision not to utilize a "blocker bill" or

otherwise require a two-thirds supermajority vote before taking up congressional redistricting legislation on the floor of the Senate during this Second Called Session violates Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, *et seq.*[2] The State of Texas believes that this decision is not subject to preclearance under Section 5.

Argument

Senate Procedures Are No Different than Those in Place on November 1, 1972

Section 5 of the Voting Rights Act requires preclearance of any "voting qualification, or prerequisite to voting, or standard, practice or procedure with respect to voting," that is "different from that in force or effect on November 1, 1972." 42 U.S.C. §1973c. Preclearance is not necessary in this case, because Senate rules and procedures affecting the use of so-called "blocker bills" have not changed since 1972.

Under Senate Rule 5.12, bills are considered on second reading "in the order in which the committee reports on them." Under Rule 5.13, bills may be taken out of order when "the regular order is suspended by a vote of two-thirds of the members present." A bill may be described as "blocker bill" when it (1) is the first bill voted out of committee and therefore first on the regular order of business; and (2) is informally understood by the Senate and the Lieutenant Governor as a bill on which no action is to be taken. In that case, the Senate must suspend the regular order of business in order to bring subsequent bills on the floor.

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[2] Civil Action No. L:03CV113; *Barrientos v. State of Texas*; In the United State District Court for the Southern District of Texas, Laredo Division (Attachment C).

The Senate used "blocker bills" on occasion before 1972, but has never *required* that a "blocker bill" be used. *See* Affidavit of Patsy Spaw, Secretary of the Senate (Attachment B). For example, prior to 1972, "blocker bills" were not used in the First Called Session of the 59th Legislature, the Second Called Session of the 57th Legislature, and the Second Called Session of the 55th Legislature. *Id.* In those Sessions, the Senate did not recognize a "blocker bill" and therefore did not suspend the regular order of business by a two-thirds vote. Bills were considered consecutively in the order in which they were voted out of committee. *Id.* Even when a "blocker bill" may have been used, a failure to get a two-thirds majority to suspend the regular order has not precluded the Senate from disposing of "blocker bills" so that the desired bill could be taken up on a simple majority vote. As noted in the affidavit, in 1968, under Lieutenant Governor Preston Smith, "an attempt was made to suspend the regular order of business to bring up H.B. 2, a tax bill, on second reading." When the motion to suspend failed 14 to 16, the bill was still brought up on a subsequent day "without a two-thirds suspension vote." *Id.* Similarly, bills that might otherwise have served as "blocker bills" were disposed of in 1961 to allow passage of legislation relating to the Texas Liquor Control Act to be taken up without a two-thirds vote.

The same intermittent use of "blocker bills" existed after 1972. *Id.* No blocker bills were used in the Third Called Session of the 72nd Legislature, the First Called Session of the 65th Legislature, or the First Called Session of the 63rd Legislature, and no two-thirds vote to suspend the order of business was taken. *Id.* Consequently, it appears that the use of "blocker bills" was allowed, but not required, under Senate Rules prior to 1972 and is allowed, but not required, under the Senate Rules at this time.

The Decision to Utilize a So-Called "Blocker Bill" Concerns Only Internal Operating Procedures

The Supreme Court of the United States has stated that Section 5 "is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting. It does not." *See Presley v. Etowah County Comm'n*, 502 U.S. 491, 509 (1972). In *Presley*, the Court held that changes that concern only the routine, internal operations of an elected body and the distribution of power among officials are not subject to Section 5 because such changes have no direct relation to, or impact on, voting. *See id.* at 506. In light of this on-point ruling, it is beyond serious dispute that the decision not to utilize a "blocker bill" is not a covered change that falls under Section 5, and therefore does not require preclearance.

The obvious impact of the Lieutenant Governor's discretionary decision not to attempt to place a "blocker bill" ahead of other legislation in the Texas Senate is that a bill may be passed, pursuant to the Senate Rules, by a simple majority of 16 Senators instead of a two-thirds supermajority of 21 Senators.

The Laredo plaintiffs' arguments are fundamentally flawed because, *inter alia*, they ignore the requirement that changes be "with respect to voting." As *Presley* explained, Section 5 is triggered by changes in standards, practices or procedures that actually pass, *i.e.*, that are formally adopted by a Legislature or other governmental body. That is because the Voting Rights Act protects *voters*, and the ability of voters to actually vote. And only those changes that pass are able to affect the ability of voters (as opposed to legislators) to vote. Until something passes, Section 5 is not triggered because the rights of voters are not affected. There are a myriad of legislative decisions—which Senators are named committee chairs, to which committee bills are referred, which Senators are recognized on the floor, which parliamentary

procedures are employed to advance or hinder a bill's passage—that are carried out daily in every legislature, but they do not trigger Section 5 because, under *Presley*, they affect merely the internal governance of the elected body, not the rights of individual voters.

Other federal court decisions make it clear that an internal distribution of power among an elected body's officials is not covered by Section 5. *See Holley v. City of Roanoke*, 149 F. Supp. 2d 1310, 1313 (M.D. Ala 2001) (change in city council's decision-making process for appointing school board members did not require prelearance); *Bonilla v. City of Council of City of Chicago*, 809 F. Supp. 590, 597 (N.D. Ill 1992) (city's requirement that at least ten alderman support a proposed redistricting ordinance before it can be submitted for voter approval is not a standard, practice or procedure under §2 of the Voting Rights Act). Indeed, in reaching its decision, the *Bonilla* court stated the following:

> Since legislatures operate under majority rule principles, requiring a majority of legislators to approve a particular redistricting plan is clearly permissible under the Voting Rights Act. Indeed, the Bonilla Plaintiffs do not even suggest that they could challenge a statutory procedure which allowed a majority of the City Council to approve a redistricting ordinance.

See id. at 596.

Similarly, in *DeJulio v. Georgia*, 127 F. Supp. 2d 1274 (N.D. Ga 2001), *aff'd in part, rev'd in part on other grounds*, 276 F.3d 1244 (2001), the court held that Section 5 did not apply to changes in internal rules and procedures by which the Georgia State Legislature enacted local legislation. *See id.* at 1300-02. In so doing, the court opined that:

> Based on the precedent of *Presley*, this Court must conclude that preclearance was not required in this case. It is true that

> changes in the various legislative delegations' rules might affect the distribution of power among officials and certain officials might have more or less authority after th change. It is also true that the value of a citizen's vote may be diminished when his elected representative has less authority. Nevertheless, the Supreme Court has *clearly, unmistakably and explicitly* held that such changes in internal rules and procedures do not rise a Voting Rights Act preclearance issue.

See id. at 1301-02 (emphasis added).

Moreover, the court recognized that principles of federalism dictate this logical result:

> Furthermore, the Voting Rights Act has never been interpreted as giving the Department of Justice broad supervisory authority over the internal operation of state legislatures. "If federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments."

See id. at 1302 (quoting *Presley*, 502 U.S. at 510).

The unrestrained construction of Section 5 urged in the Laredo lawsuit would radically overhaul the operating procedures of an elected governmental body, in essence mandating that the President of the Texas Senate (the Lieutenant Governor of Texas) cede to federal authorities near-complete control over the daily, internal workings of the Senate, no matter what the governing Senate Rules say. Such an overbroad reading would allow federal law to seriously encroach on the internal governing procedures of a sovereign State and dictate how the Senate calendar and daily flow of legislation through the Chamber is conducted. It is hard to imagine processes more fundamental to the sovereignty of States

than the ongoing legislative decisions of which bills to introduce, and when, and which bills to pass, and when.

Indeed, to state the relief sought by the Laredo plaintiffs is to realize its overbreadth. If a court were to rule in their favor, the court would presumably issue an injunction that the Texas Senate may not consider redistricting legislation unless: (1) a Senator first introduces separate legislation, a "blocker bill," (2) the Lieutenant Governor immediately refers it to committee, (3) the committee passes the bill before any other legislation is passed, and (4) the Senate refrains from passing the "blocker bill" once it comes to the floor. The process would be nothing short of a federal court's writing and imposing procedural rules for a state legislature governing the introduction and passage of legislation and requiring a two-thirds vote before redistricting legislation can ever be voted on. A federal injunctive order that intruded into the sovereignty of a State to that level, and that in effect commandeered the machinery of state government in such a manner, would raise very serious constitutional problems that could threaten the Voting Rights Act itself. *See Printz v. United States*, 521 U.S. 898, 912 (1997) ("We have held . . . that state legislatures are *not* subject to federal direction." (Emphasis in the original)); *New York v. United States*, 505 U.S. 144, 179 (1992) ("No . . . constitutional provision authorizes Congress to command state legislatures to legislate."); *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) (noting the "serious federalism costs already implicated by §5").

The informal agreement to place a "blocker bill" atop the Senate calendar is simply that—an informal agreement—sometimes used, sometimes not. But any determination that this internal operational arrangement somehow implicates Section 5 would depart drastically from governing precedent and slide down a slippery slope that would empower federal officials with almost limitless authority to micromanage a range of what are quintessentially state legislative judgments.

The United States Supreme Court has considered similar arguments before—though none quite so remarkable as those suggested in the Laredo lawsuit—and roundly rejected them. Whether the presiding officer of the Texas Senate chooses to use a "blocker bill" as an internal parliamentary tool to manage the Senate calendar is plainly not a change "with respect to voting" covered by Section 5. A wealth of on-point precedent demonstrates that this parliamentary decision—which concerns "the internal operations of an elected body," *Presley*, 502 U.S. at 503, *not* Texas election law writ large (or small)—in no way triggers scrutiny under the Act.

Covered changes much bear a direct relation to voting itself, and Section 5's coverage simply does not reach a state senate's "internal operating procedures." *Id.* at 504. Section 5 is unambiguous, and the Supreme Court has rejected claims that urge an unconstrained interpretation. The governing law is clear: changes "with respect to voting" are covered and require preclearance; changes "with respect to governance" are not. Finding otherwise would represent federal control over the most core, internal state legislative matters. Since the requirements of Section 5 are inapplicable in this case, the State of Texas requests that the United States Department of Justice confirm in writing that no preclearance is required in this matter.

Alternative Request for Administrative Preclearance

In the unlikely event that the Department believes that the aforementioned decision by the Texas Lieutenant Governor is in fact covered by Section 5,[3] then the State of Texas contends that preclearance should be granted because the decision (1) does not

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[3] Submission of this letter is in no way a waiver of the rights of the State of Texas—and the State expressly preserves its rights—to contest judicially whether the internal procedures of the Texas Senate are subject to Section 5 preclearance.

have a racially discriminatory purpose, (2) will not make minority voters worse off than they were prior to the decision (*i.e.*, the decision is not retrogressive), and (3) does not deny or abridge the right to vote on account of race, color, membership in a language minority group.

As mentioned previously, the current Second Called Session expires on August 26, 2003. Because time is of the essence, this request is appropriate for expedited treatment, pursuant to 28 C.F.R. §51.34. We have attached the absent Senators' complaint (Attachment C). We are not able to attach any documentation to support their claim of a change to a "2/3 Rule"; as noted above, there is no "2/3 Rule," but only an informal agreement about whether and which legislation to introduce and when to pass or not pass that legislation, sometimes observed and sometimes not. The absence of any text of a rule or rule change underlines why this issue is not subject to preclearance.

Should you have any questions regarding this matter, please contact Don Willett, Deputy Attorney General for Legal Counsel at the Office of the Texas Attorney General, at (512) 463-2191.

Very truly yours,

/s/

Geoffrey S. Connor

Appendix B

28 C.F.R. §51.35 Disposition of inappropriate submissions.

The Attorney General will make no response on the merits with respect to an inappropriate submission but will notify the submitting authority of the inappropriateness of the submission. Such notification will be made as promptly as possible and no later than the 60th day following receipt and will include an explanation of the inappropriateness of the submission. Inappropriate submissions include the submission of changes that do not affect voting (see, e.g., § 51.13), the submission of standards, practices, or procedures that have not been changed (see, e.g., §§51.4, 51.14), the submission of changes that affect voting but are not subject to the requirement of Section 5 (see, e.g., § 51.18), premature submissions (see §§ 51.22, 51.61(b)), submissions by jurisdictions not subject to the preclearance requirement (see §§ 51.4, 51.5), and deficient submissions (see § 51.26(d)).

Appendix C

U.S. Department of Justice

Civil Rights Division

RAA:JDR:RAK:TEM:jdh:par
166-012-3
2003-2939

Voting Section - NWB.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

August 26, 2003

Geoffrey S. Connor, Esq.
Assistant Secretary of State
State of Texas
P.O. Box 12697
Austin, Texas 78711-2697

Dear Mr. Connor:

This letter refers to your recent correspondence in which you request clarification under the Procedures for the Administration of Section 5 (28 C.F.R. 51.35) of whether preclearance is required pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, before the Texas Lieutenant Governor may bring congressional redistricting legislation to the floor of the Senate during the Second or any subsequent Called Session, without having first introduced a so-called "blocker bill" that could be bypassed only by a two-thirds vote to suspend the Senate rules. Your letter takes the position that Section 5 preclearance is not required under these circumstances but asks that this Department

treat your letter as a Section 5 submission if we determine that the practice in question requires Section 5 preclearance. We received your letter on August 15, 2003; supplemental information was received on August 22, 2003, and you have requested expedited administrative consideration pursuant to 28 C.F.R. 51.34.

Our analysis indicates that the practice in question is an internal legislative parliamentary rule or practice – not a change affecting voting – and, therefore, is not subject to the preclearance requirement of Section 5. See Presley v. Etowah County Commission, 502 U.S. 491, 502 (Section 5 does not cover the internal operating procedures of an elected body). Accordingly, no determination by the Attorney General is required or appropriate under Section 5. See 28 C.F.R. 51.2, 51.12, 51.13, and 51.35.

If and when a new redistricting plan is actually adopted by the Texas Legislature, signed into law by the Governor, and submitted to the Attorney General for Section 5 review, the Attorney General will review the entire proposed plan and the process by which it has been adopted to ensure that the submitted changes have neither a discriminatory purpose nor a discriminatory effect. See Georgia v. United States, 411 U.S. 426 (1973); see also 28 C.F.R. 51.52.

Sincerely,

/s/

Joseph D. Rich
Chief, Voting Section

Appendix D

28 C.F.R. §51.22 Premature submissions.

The Attorney General will not consider on the merits: (a) Any proposal for a change affecting voting submitted prior to final enactment or administrative decision or (b) any proposed change which has a direct bearing on another change affecting voting which has not received Section 5 preclearance. However, with respect to a change for which approval by referendum, a State or Federal court or a Federal agency is required, the Attorney General may make a determination concerning the change prior to such approval if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken.

Appendix E

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, DC 20035*

December 19, 2003

Honorable Geoffrey S. Connor
Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Secretary Connor:

I am writing in reference to your recent submission pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, of (i) Texas House Bill 1, which provides for the extension of the filing period for congressional candidates, changes in the primary election dates, procedures for canvassing, and the allowance of late counting of ballots; and (ii) Texas House Bill 3, which provides the 2003 Congressional Redistricting Plan enacted by the Texas Legislature. We received your initial submission on October 21, 2003, and received supplemental information at various times through December 11, 2003.

The Attorney General does not interpose any objection to the specified changes in House Bill 1 or House Bill 3. We do note, however, that Section 5 provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the

Administration of Section 5 of the Voting Rights Act, 28 C.F.R. 51.41 and 51.43.

Because the Section 5 status of these changes is of interest to the court in *Session v. Perry*, Civil Docket No. 2:03-CV-354 (E.D. Texas, Marshall Division), we also are providing a copy of this letter to the court.

Sincerely,

/s/

Sheldon T. Bradshaw
Principal Deputy Assistant
Attorney General

cc: Honorable Patrick E. Higginbotham
Honorable T. John Ward
Honorable Lee H. Rosenthal

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

GONZALO BARRIENTOS, ET AL.,	*	
Plaintiffs,	*	
VS.	*	CIVIL ACTION
	*	NO. L-03-113
STATE OF TEXAS, ET AL.	*	
Defendants.	*	

MEMORANDUM

Plaintiffs have filed a notice of appeal to the United States Supreme Court from the Memorandum and Order of September 12, 2003 (Docket No. 34). In that Memorandum, this Court specifically withheld a ruling on Plaintiffs' motion to file a first amended complaint, indicating that further factual and legal development was necessary. Accordingly, we did not enter a separate order of dismissal at that time, as contemplated by Rules 54(a) and 58(a), Fed. R. Civ. P. Subsequent events appear to have mooted any further action in this case, and the Court now proposes to enter a

separate order closing it. Any comment on this proposal should be submitted no later than November 24, 2003.

DONE this 4th day of November, 2003.

U.S. CIRCUIT JUDGE PATRICK E. HIGGINBOTHAM
CHIEF U.S. DISTRICT JUDGE GEORGE P. KAZEN
U.S. DISTRICT JUDGE LEE H. ROSENTHAL

Appendix G

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

GONZALO BARRIENTOS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. L-03-CV-113
STATE OF TEXAS, *et al.*,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF SENATORS' RESPONSE TO COURT MEMORANDUM OF NOVEMBER 4, 2003

The eleven plaintiff Senators in the above-referenced matter respond as follows to the Court's Memorandum inquiry of November 4, 2003:

Issue and background

The question raised by the Court in its November 4th Memorandum is whether subsequent events have mooted any further action in this case, including disposition of the still-pending motion for leave to file a first amended complaint. The Senators think not; a live controversy remains.

The Court's memorandum opinion and order of September 12, 2003, denied the Senators' request for a preliminary injunction and dismissed without hearing other constitutional and statutory claims

of the Senators concerning the validity of the Lieutenant Governor's change of the rules governing the Texas Senate. The Senators appealed the preliminary injunction denial on September 22, 2003, and filed their jurisdictional statement with the Supreme Court of the United States on November 21, 2003.

Untouched by the Court's September 12th order was the Senator's motion for leave to file a first amended complaint. In particular, the Court's September 12th disposition did not address the constitutional and statutory issues surrounding the unprecedented threats, fines, and other sanctions imposed by the Lieutenant Governor and a group of Senators on the eleven plaintiff Senators. As highlighted in ¶ 2 of the motion for leave to file the amended complaint, these issues were the focus of the proposed amended complaint. The Court has never reached them.

Live controversy remains, notwithstanding changing fines and sanction to "conditional"

Subsequent to the Court's September 12th ruling, the Texas Senate did act to modify the fines and sanctions; however, it has never lifted them. Instead, the key piece of the Senate's modification made avoidance of the already-imposed fines and sanctions a condition of probation for the plaintiff Senators. The punitive fines and sanctions action, it was determined, would not be imposed as long as the eleven Senators satisfied certain conditions for a certain period into the future. That probationary period has not expired. Thus, the fines and sanctions remain in place, albeit conditionally, and constitute a continuing threat to the plaintiffs' freedom of action and conscience as legislators.

Conditional punishments such as the one that remains in place here burden future conduct of the subjects of the punishments. That the punishment *may* not occur if certain conditions are satisfied means that there are continuing collateral consequences if certain choices are made by those subject to the punishments. The actual

threat of continuing collateral consequences defeats a claim of mootness. *See, e.g., Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968) (continuing burdens flowing from criminal punishment mean that completion of criminal sentence does not moot legal challenge concerning the conviction); *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) (actual possibility of future imposition of already-imposed more severe criminal penalty kept challenge from being moot). A case does not become moot simply because a court order redressing an alleged grievance has been obeyed. *See, e.g., Los Angeles County v. Davis*, 440 U.S. 625, 643 (1979). Similarly, this challenge has not become moot simply because the eleven Senators currently are acting in such a way as not to trigger the imposition of otherwise conditional sanctions.

Conclusion

This case is not moot and should be allowed to proceed on the fines and sanctions issue. A Senate determination actually lifting the sanctions and fines entirely - and unconditionally - would moot this case. That there has been an adamant refusal to take such a step is sufficient demonstration that the issues arising from this unprecedented act remain the subject of dispute.

Respectfully submitted,

/s/ Renea Hicks by cz w/ permission
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/s/ Jerry Hebert by cz w/ permission
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Attorneys for the Plaintiffs

Of counsel:

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2003, I served a copy of the foregoing **Plaintiff Senators' Response to Court Memorandum of November 4, 2003**, on the following counsel, by facsimile, and by placing a copy of the same in the United States mail, postage prepaid, to:

Hon. R. Ted Cruz
Solicitor General
P.O. Box 12548
Austin, Texas 7871102548

/s/
Carlos M. Zaffirini, Sr.

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

GONZALO BARRIENTOS, RODNEY ELLIS, MARIO GALLEGOS, JR., JUAN "CHUY" HINOJOSA, EDDIE LUCIO, JR., FRANK L. MADLA, ELIOT SHAPLEIGH, LETICIA VAN DE PUTTE, ROYCE WEST, JOHN WHITMIRE, and JUDITH ZAFFIRINI, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. L-03-113
STATE OF TEXAS, RICK PERRY, in his official capacity as Governor of the State of Texas, and DAVID DEWHURST, in his official capacity as Lieutenant Governor and Presiding Officer of the Texas Senate, Defendants.	§	

MEMORANDUM AND ORDER

Still pending is Plaintiffs' motion for leave to file an amended complaint. (Docket No. 13) The proposed amended complaint was intended to address fines and other sanctions threatened and/or imposed against the plaintiff Senators at a time when they were deliberately absenting themselves from the Second Special Session of 2003. The amendment first alleged that these sanctions imposed "new qualifications and requirements for holders of elected office," in violation of the Voting Rights Act. Plaintiffs also alleged that the threats violated the due process, equal protection, ex post facto, and bill of attainder clauses of the federal Constitution, as well as the First Amendment. On November 4, 2003, the Court issued a Memorandum seeking comment from the parties on whether subsequent events and litigation had rendered this motion moot (Docket No. 37). Both Plaintiffs (Docket No. 38) and Defendants (Docket No. 39) responded.

On September 18, 2003, the Texas Senate revoked sanctions, including a substantial fine and loss of parking privileges, previously imposed on the Plaintiff senators. Instead, Plaintiffs were placed on probation for a period terminating on January 11, 2005, conditioned on compliance with a "72 hour rule" limiting the senators' ability to absent themselves "without sufficient excuse" from any future proceedings. Although this probationary period remains in effect, the 78th term of the Texas State Senate has closed, and there are no currently scheduled special sessions.

Where Plaintiffs have suffered no injury and the challenged provision's "future effect remains wholly speculative," the claims will be dismissed for lack of ripeness. *Socialist Labor Party v. Gilligan*, 92 S.Ct. 1716, 1720 (1972). Courts deciding ripeness of a particular claim consider both the "fitness of issues for judicial decision" and the 'hardship to the parties of withholding court consideration." *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003)

(citations omitted). These considerations suggest that Plaintiffs' proposed claims in this case are not ripe.

"A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 118 S.Ct. 1257, 1259 (1998) (internal citations omitted). Given that the Senate has been adjourned until the 2005 session, Plaintiffs are currently facing no hardship. Plaintiffs ask the Court to analogize their penalty to one imposed in a criminal context. Undeniably, criminal defendants may challenge the terms of their supervised release or probation. *See, e.g., U.S. v. White*, 244 F.3d 1199 (10th Cir. 2001); *U.S. v. Loy*, 237 F.3d 251 (3rd Cir. 2001). However, courts have often refused to adjudicate claims arising out of conditions which would not be imposed until some distant date in the future. *U.S. v. Thomas*, 198 F.3d 1063, 1065 (8th Cir. 1999) (finding unripe challenge to release condition that defendant not associate with gang members where defendant had not yet served prison term) ; *U.S. v. McAllister*, 225 F.3d 982, 989-990 (8th Cir. 2000) (finding challenge to condition of release unripe where it would take effect only if appellant was released from in-patient facility); *U.S. v. Dixon*, 538 F.2d 812, 814 (9th Cir. 1976) (finding unripe claim challenging potential extension of prison term if appellant were unable to pay fines in the future).

Media reports indicate that another special session might be called this year to address the issue of school financing. Even if that happens, Plaintiffs' claims would not automatically "ripen." Again, analogizing to the criminal context, the Supreme Court has suggested that courts should consider the "likelihood that the complainant will disobey the law, the certainty that such disobedience will take a particular form, any present injury occasioned by the threat of prosecution, and the likelihood that a prosecution will actually ensue." *Blanchette v. Connecticut General Ins. Corps.*, 95 S.Ct. 335, 358, n. 29 (1974). It is highly speculative that the school-financing issue would provoke another

deliberate quorum-breaking exodus sufficient to trigger the suspended penalties. So long as a quorum existed, the absence of some senators would not likely concern the majority, which would only be strengthened by the absences.

"Unnecessary decisions dissipate judicial energies better conserved for litigants who have a real need for official assistance." 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3521.1 at 114. (2d ed. 1984). This admonition is especially pertinent here, considering the novel nature of Plaintiffs' federal theories, which are based on possible actions of a state governmental body, the validity of which have not even been tested in state courts. *See Texas v. United States*, 118 S.Ct. 1257, 1260 (1998) (". . . . the remoteness and abstraction [of the issues] are increased by the fact that [the challenged provision] has yet to be interpreted by the Texas courts.").

For the foregoing reasons, Plaintiffs' Motion to Amend the Complaint is DENIED. This case shall now be deemed CLOSED.

DONE this 22th day of January, 2004.

U.S. CIRCUIT JUDGE PATRICK E. HIGGINBOTHAM
CHIEF U.S. DISTRICT JUDGE GEORGE P. KAZEN
U.S. DISTRICT JUDGE LEE H. ROSENTHAL

Appendix I

Rules of the Texas Senate
78th Texas Legislature
(excerpts)

STATEMENT OF AUTHORIZATION AND PRECEDENCE

Pursuant to and under the authority of Article III, Section 11, of the Constitution of 1876, as amended, and notwithstanding any other provision of statute, the Senate adopts the following rules to govern its operations and procedures. The provisions of these rules and of the Constitution shall be deemed the only requirements binding on the Senate, notwithstanding any other requirements expressed elsewhere in statute.

* * * * *

ARTICLE V

SENATE PROCEDURAL RULES (ORDER OF BUSINESS)

PRESIDING OFFICER TO ASSUME CHAIR

Rule 5.01. The presiding officer shall take the chair at the hour to which the Senate last adjourned.

QUORUM

Rule 5.02. Two-thirds of all the Senators elected shall constitute a quorum, but a smaller number may adjourn or recess from day to day and compel the attendance of absent members (Constitution, Article III, Section 10). In case a less number shall convene, the members present may send the Sergeant-at-Arms or any other person or persons for any or all absent members.

ABSENCES

Rule 5.03. No member shall absent himself or herself from the sessions of the Senate without leave unless the member be sick or unable to attend.

CALL OF THE SENATE

Rule 5.04. It shall be in order to move a call of the Senate at any time to secure, to maintain, or to secure and maintain a quorum for the following purposes:

(1) for the consideration of a specific bill, resolution, or other measure;

(2) for a definite period of time or for the consideration of any particular class of bills.

When a call of the Senate is moved for one of the above purposes and seconded by five members and ordered by a majority of those present, the Doorkeeper shall close the main entrance to the floor of the Senate. All other doors leading from the floor of the Senate shall be locked and no member shall be permitted to leave the Senate without written permission of the presiding officer until after the subject matter upon which the call was ordered has been disposed of. The Secretary shall call the roll of members and note the absentees. Those for whom no sufficient excuse is made, by order of the majority of those present, may be sent for and arrested wherever they may be found and their attendance secured and retained by the Sergeant-at-Arms or officers appointed by the Sergeant for that purpose. The Senate shall determine upon what conditions they shall be discharged. Members who voluntarily appear shall, unless the Senate otherwise directs, be immediately admitted to the floor of the Senate, and they shall report their names to the Secretary to be entered upon the journal as present. Until a quorum appears, should the roll call fail to show one present, no

business shall be done except to compel the attendance of absent members or to adjourn.

When a quorum is shown to be present, the Senate may proceed with the matters upon which the call was ordered or may enforce and await the attendance of as many of the absentees as it desires to have present. If the Senate decides to proceed, the Sergeant-at-Arms shall not be required to bring in other absentees unless so ordered by a majority vote of the Senate.

* * * * *

ORDER OF CONSIDERING BILLS AND RESOLUTIONS

Rule 5.09. At the conclusion of the morning call, the Senate shall proceed to consider business on the President's table, which shall be disposed of in the following order:

(1) special orders;

(2) unfinished business;

(3) Senate Joint Resolutions;

(4) Senate Resolutions;

(5) Senate Concurrent Resolutions;

(6) Senate bills on third reading;

(7) Senate bills on second reading;

(8) House Joint Resolutions;

(9) House bills on third reading;

(10) House bills on second reading;

(11) House Concurrent Resolutions.

The above order is for Senate bill days, except as modified by any Joint Rules.

HOUSE BILL DAYS

Rule 5.10. On calendar Wednesday and calendar Thursday of each week, House Joint Resolutions and House bills on special order and on third and second readings, respectively, and House Concurrent Resolutions shall be taken up and considered until disposed of; provided in case one should be pending at adjournment on Thursday, it shall go over until the succeeding calendar Wednesday as unfinished business.

SPECIAL ORDERS

Rule 5.11. (a) Any bill, resolution, or other measure may on any day be made a special order for a future time of the session by an affirmative vote of two-thirds of the members present.

(b) A special order shall be considered at the time for which it is set and considered from day to day until disposed of, unless at the time so fixed there is pending business under a special order, but such pending business may be suspended by a two-thirds vote of all the members present. If a special order is not reached or considered at the time fixed, it shall not lose its place as a special order. All special orders shall be subject to any Joint Rules and Rule 5.10.

(c) Upon the affirmative vote of four-fifths of the members present, a special order may be reset to an earlier time than previously scheduled.

REGULAR ORDER OF BUSINESS

Rule 5.12. (a) Bills and resolutions shall be considered on second reading and shall be listed on the daily calendar of bills and resolutions on the President's table for second reading in the order in which the committee reports on them are received by the Senate. Upon the filing of a committee report on a bill or resolution as provided by Rule 11.12, the Secretary of the Senate shall note the date and time the report was filed. The Journal Clerk shall record the order in which the committee report was received in the Senate Journal for the day on which the Senate next convenes.

(b) Bills and resolutions shall be considered on third reading in the order in which they were passed on second reading.

SUSPENSION OF THE REGULAR ORDER OF BUSINESS

Rule 5.13. No bill, joint resolution, or resolution affecting state policy may be considered out of its regular calendar order unless the regular order is suspended by a vote of two-thirds of the members present.

* * * * *

ARTICLE VI

MOTIONS

MOTIONS AND THEIR PRECEDENCE

Rule 6.01. (a) When a question is under consideration by the Senate, no motion shall be made except:

(1) to fix the day to which the Senate shall adjourn or recess;

(2) to adjourn or recess;

(3) to proceed to the transaction of executive business;

(4) the previous question;

(5) to lay on the table;

(6) to lay on the table subject to call;

(7) to postpone to a time certain;

(8) to commit;

(9) to amend;

(10) to postpone indefinitely.

These several motions have precedence in the order named. It shall be in order to make any number of the above motions before any vote is taken, but the votes shall be taken on all such motions made in the order of the precedence above stated.

(b) Upon compliance with pertinent Senate Rules, motions addressing House amendments to Senate bills, resolutions suspending the constitutional limitation on spending, resolutions suspending conference committee limitations, appointment of conference committees, and conference committee reports are privileged and may be taken up at any time when no other matter is pending before the Senate.

LIMITATION OF DEBATE ON MOTIONS

Rule 6.02. No debate shall be allowed on a motion to lay on the table, for the previous question, or to adjourn or recess; provided, however, that the author of a measure or whichever one of the several authors of the same may be by them selected so to do shall have the right, when a motion to lay on the table shall have been made, to close the debate, which privilege the member may yield to any other Senator subject to all of the Rules of the Senate.

* * * * *

PAIRED VOTES

Rule 6.17. If a member who is absent desires to be recorded on a pending question, the member may cast a paired vote by signing a pair slip which indicates the member's "yea" or "nay" vote with a member who is present and casting an opposite vote, if the member who is present so desires. Pair slips must be signed by both the absent and present member and filed with the Secretary of the Senate before the vote. The paired votes of the present and absent members shall be recorded as an expression of opinion on the matter considered but shall not be counted in the total of votes for or against the measure or motion. However, the member present shall be counted to make a quorum.

LIEUTENANT GOVERNOR TO GIVE CASTING VOTE

Rule 6.18. If the Senate be equally divided on any question, the Lieutenant Governor, if present, shall give the casting vote. (Constitution, Article IV, Section 16)

* * * * *

ARTICLE XVI

VOTES REQUIRED TO ADOPT MOTIONS

MATTERS REQUIRING VOTE OF TWO-THIRDS OF MEMBERS OF SENATE

Rule 16.05. A vote of two-thirds of the members of the Senate shall be required for:

(1) final passage of proposed amendment to the Constitution; Rule 10.02 (Constitution, Article XVII, Section 1)

(2) immediate effect of a bill; (Constitution, Article III, Section 39)

(3) the release of payment of taxes in cases of great public calamity; (Constitution, Article VIII, Section 10)

(4) final passage of bills to reduce county to less area than 900 square miles; (Constitution, Article IX, Section 1)

(5) passage of an address to the Governor for the removal of any civil officer; (Constitution, Article XV, Section 8)

(6) expulsion of a member of the Senate; Rule 4.09 (Constitution, Article III, Section 11)

(7) passage of House bills that have been returned by the Governor with objections. Rule 6.20. (Constitution, Article IV, Section 14)

MATTERS REQUIRING VOTE OF TWO-THIRDS OF MEMBERS PRESENT

Rule 16.06. A vote of two-thirds of the members present shall be required to:

(1) impeach any officer; (Constitution, Article XV, Section 3)

(2) pass a Senate bill that has been returned by the Governor with objections; Rule 6.20 (Constitution, Article IV, Section 14) See note to Rule 6.20.

(3) confirm an appointee of the Governor, unless otherwise directed by law; (Constitution, Article IV, Section 12)

(4) adopt an amendment at third reading of a bill or a joint resolution; Rules 7.19 and 10.02

(5) suspend the floor privileges of a member of the Senate; Rule 4.07

(6) suspend the regular order of business; Rule 5.13

(7) excuse absentees; Rule 5.03

(8) set a matter for special order; Rule 5.11. See note to Rule 5.11.

(9) place a minority report on the calendar; Rule 11.17

(10) rerefer a bill to another committee; Rule 6.08

(11) suspend the section-by-section analysis on conference committee reports; Rule 12.10

(12) suspend or rescind any rule of the Senate unless the rules specify a different majority; Rule 22.01

(13) consider immediately petitions, concurrent and joint resolutions, or resolutions setting or defining legislative or state policy. Rule 8.02. See note to Rule 8.02.

* * * * *

MATTERS REQUIRING VOTE OF MAJORITY OF MEMBERS PRESENT

Rule 16.08. A vote of the majority of members present shall be required to:

(1) elect officers; Rule 1.05

(2) elect a member to preside; Rule 1.01

(3) remove a member from the chair; Rule 4.08

(4) pass a bill on second reading; Rule 7.17

(5) pass a bill on third reading, except to give immediate effect to the bill as required by Rule 7.18;

(6) adopt an amendment on second reading;

(7) adopt a motion to reconsider vote; Rules 6.10 and 6.11

(8) dispense with reading of papers; Rule 6.13. See note to Rule 6.13.

(9) debate a congratulatory, memorial, or courtesy resolution; Rule 8.03. See note to Rule 8.03.

(10) adopt a motion for previous question, after five seconds; Rule 6.09. See note to Rule 6.09.

(11) adopt a motion for immediate ruling, after 10 seconds; Rule 6.12. See note to Rule 6.12.

(12) concur in House amendments to Senate bills, except to give immediate effect to the bill as required by Rule 16.05(2);

(13) adopt a Conference Committee Report, except to give immediate effect to the bill as required by Rule 16.05(2).

* * * * *

ARTICLE XX

WHEN SENATE RULES ARE SILENT

PRESIDENT OF SENATE DECIDES QUESTION

Rule 20.01. The President of the Senate shall decide all questions not provided for by the standing Rules of Order of the Senate and Joint Rules of Order of both branches of the Legislature, according to parliamentary practice laid down by approved authors.

APPEAL TO SENATE

Rule 20.02. The President's ruling is subject to appeal to the entire Senate.

ARTICLE XXI

ADOPTION OF RULES

SENATE RULES

Rule 21.01. The Senate shall at the beginning of each Legislative Session adopt temporary or permanent Senate rules by resolution of the Senate. The Senate rules shall be adopted by a majority of the members of the Senate.

Appendix J

AFFIDAVIT OF PATSY SPAW

THE STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared Patsy Spaw, who is personally known to me to be the person subscribing her name below, and after being duly sworn by me according to law, on her oath deposed and stated:

"My name is Patsy Spaw, and I am the Secretary of the Senate and custodian of its records. I am over twenty-one and in all ways competent to swear out this affidavit. All information provided herein is within my personal knowledge and is true and correct."

"Under Senate Rule 5.12, bills are considered on second reading 'in the order in which the committee reports on them.' Under Rule 5.13, bills may be taken out of order when 'the regular order is suspended by a vote of two-thirds of the members present.'"

"Because of these rules, a bill is often introduced at the beginning of a session that is intended to be the first bill out of committee, with an informal understanding that the bill, usually on an innocuous subject, will not be voted upon by the full Senate. This bill is then known as a 'blocker bill' remains at the top of regular order, and following bills are then taken up on second reading after the regular order of business has been suspended by a two-thirds vote."

"Blocker bills receive no official designation by the Senate; whether or not a bill may be considered 'blocker bill' depends on the Senators' informal understanding or agreement. There is no prohibition against Senators' voting out or otherwise disposing of a purported 'blocker bill' and thus allowing subsequent bills to be taken up without a need to suspend the rules."

"Furthermore, whether or not a bill is treated by the Senate as a 'blocker bill' depends on the actions taken by many people. First, a Senator must introduce a bill that is not intended for actual passage. The committee considering the bill must then ensure that it is the first bill reported out of committee. Occasionally, a Senator will intend a bill to serve as a 'blocker bill' but the committee will not vote it out in time to be used as such. For example, in 1991, under Lieutenant Governor Bob Bullock, a bill intended to serve as a blocker bill was introduced in the Fourth Called Session of the 72nd Legislature. Although the bill was filed and referred to committee, it was never reported from committee. No other bill served the 'blocker bill' role."

"In some cases, bills that might otherwise have been 'blocker bills' have been voted out of the Senate or otherwise disposed of in order to avoid the need for a two-thirds vote to take subsequent bills out of order. For example, in 1961, under Lieutenant Governor Ben Ramsey, the Senate disposed of three House bills before reaching H.B. 533, relating to the Texas Liquor Control Act. One bill was postponed by unanimous consent, another was recommitted to committee, and the third was laid out and passed. H.B. 533 was then laid out on second reading without suspension of the regular order. It passed to a third reading on a voice vote with 14 senators recorded as voting no. Suspension of the three-day rule failed by a 14 to 14 vote."

"Sometimes a bill will not get the two-thirds vote to suspend the regular order, but will be passed later when it arrives at the top of the regular order of business. For example, on Tuesday, June 25, 1968, under Lieutenant Governor Preston Smith, an attempt was made to suspend the regular order of business to bring up H.B. 2, a tax bill, on second reading. The motion to suspend failed 14 to 16. The next day was a House Bill day, and H.B. 2 was first on the list of House Bills and was laid out before the Senate without a two-thirds suspension vote."

"Often, Senators will vote suspend the regular order of business even when they are not considering bills out of order. For example, in the Third Called Session of the 62nd Legislature, there was only one bill introduced. Nevertheless, the regular order of business was still suspended in order to take up the bill."

"Historically, according to the *Senate Journal* there were many times that the Senate did not recognize a 'blocker bill' and therefore did not suspend the regular order of business by a two-thirds vote when considering bills that were at the top of regular order. Instances where the Senate followed this practice occurred in the Third Called Session of the 72nd Legislature, the First Called Session of the 65th Legislature, the First Called Session of the 63rd Legislature, the First Called Session of the 59th Legislature, the Second Called Session of the 57th Legislature, and the Second Called Session of the 55th Legislature."

Further, Affiant sayeth not.

____/s/_____
Patsy Spaw, Affiant

SUBSCRIBED TO AND SWORN BEFORE ME, on August 15, 2003, to certify which witness my hand and seal of office.

_____/s/_____
Notary Public in and for the State of Texas

(3)

No. 03-756

Supreme Court, U.S.
FILED
MAR 30 2004
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IN THE

Supreme Court of the United States

GONZALO BARRIENTOS, *et al.*,
Appellants,

v.

STATE OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas

APPELLANTS' OPPOSITION TO MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

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Over the course of the last century in Texas, during most of which there were no minority officeholders and minority voters were effectively disenfranchised, the Texas Senate followed a consistent practice of requiring a supermajority vote (2/3 or better) before any legislation would be considered on the Senate floor. Known as the "2/3 Rule", Texas senators used its protections to guard against legislation deemed harmful to their interests and to forge a consensus on legislative priorities. In 2003, eleven senators—the nine minority legislators in the Texas Senate and two Anglos representing overwhelmingly minority districts—attempted to use the protections of the 2/3 Rule to block congressional redistricting legislation. But when it became clear that the 2/3 Rule would prevent a redistricting bill from passing, state officials changed the traditional practice and abandoned the 2/3 Rule.

In the face of this history, and the uncontradicted record below showing the Texas Senate's long-standing use of the 2/3 Rule, the State now denies its existence. The State advances a number of arguments about why there is no such thing as a 2/3 Rule, or why, if there is such a Rule, Appellants' claims about its abandonment are now moot. Against the backdrop of what happened in Texas in 2003, it is not surprising that the State's motion blinks reality. And where forced to confront reality, the State attempts to muddy the waters. But as we show below, when all the rhetoric is stripped away, it is clear that: the Texas Senate changed its long-standing practice or procedure for considering legislation; that it did so in order to pass congressional redistricting legislation; that the State in fact applied the changed procedures in 2003 to enact a new congressional bill; and that no Section 5 preclearance of that change has been obtained.

I. The Texas Senate Has a Long-Standing Practice or Tradition For Considering Legislation, Known as the 2/3 Rule.

Contrary to the false impression the State attempts to create, the Texas Senate has had a supermajority 2/3 Rule for decades. One needs to look no further than trial testimony given by one of the Republican leaders of the Texas Senate, Senator (and former Lieutenant Governor) Bill Ratliff, who recently resigned his senate seat because of the abandonment of the very 2/3 Rule that the State claims is nonexistent. Senator Ratliff, during the trial on the Texas congressional redistricting plan, was asked if redistricting in 2001 or 2003 in Texas played a role in his decision to leave the Senate. He replied: "Well, I won't say it was not a factor, but I'm not going to say it was the determinative factor. As a matter of fact, I would say that the demise of the 2/3 tradition was more of a factor than redistricting was. And I guess there is some overlap there because it—because it happened on that issue." Trial transcript in *Session v. Perry*, December 15, 2003, at pp. 22-23.[1] Indeed, in its decision, the three-judge court in *Session* observed: "In the course of the redistricting bill's passage, Senator Ratliff, a Republican, refused to abandon the two-thirds rule, which does not allow a bill to come to the floor without the support of 21 members, a practice calculated to promote consensus building." *Session v. Perry*, 298 F. Supp. 2d 451, 473 (E.D. Tex. 2004).

Appellants and Appellees largely agree on the operation of the supermajority 2/3 Rule and how it has traditionally

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[1] *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (three-judge court), involved a challenge to Texas's 2003 congressional redistricting plan. Appeals of that decision are pending in this Court, with the Jurisdictional Statements due by April 5, 2004. We have lodged copies of Senator Ratliff's testimony from that case with the clerk of this Court.

been used in the Texas Senate.[2] *See* J.S. at Appendices F, G, and H. There also has been no dispute that whether the legislative tool employed was a blocker bill or some other legislative mechanism, a supermajority (2/3) Rule has been the consistent practice and procedure of the Texas Senate insofar as congressional redistricting legislation has been concerned. Thus, Appellants' expert observed, again unrebutted by Appellees, that "the use of . . . any method to place a bill before the Senate other than by a motion to suspend the rules (which requires a two-thirds vote of members present under the Senate Rules) is a clear deviation from the normal, established Senate practices and procedures." J.S. App. 42a.

II. Abandonment of the 2/3 Rule Was Aimed at Congressional Redistricting Legislation.

The sequence of events that led to the State's decision to abandon the supermajority (2/3) vote requirement in the second and third special sessions in 2003 shows quite clearly that the target of the new procedure was congressional redistricting legislation. During the first session, the 2/3 Rule was in place, and when 11 senators (more than a third of the 31-member Texas Senate) announced they would not allow a congressional redistricting bill to be brought forward (ahead of the blocker bill), the legislation died. As the Lieutenant Governor candidly admitted toward the close of the first special session and just prior to the second, "We didn't have

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[2] Indeed, in the court below, the State of Texas conceded that it has a "tradition" of using a practice or procedure that forces a supermajority 2/3 vote on bills in the Senate if they are taken out of order. *See* Defendants' Motion to Dismiss at 4 (calling the use of a blocker bill a "tradition"); *id.* at 4 n.1 (referring to the blocker bill as an "informal tradition").

the votes to bring it up" and thus he planned to "bypass the 21-vote tradition in the next session." Ex. 14.

Appellants were then faced with a choice. They could attend the second session and allow the abandonment of the treasured tradition in the Texas Senate, or they could resort to the only legislative maneuver available to them: break quorum. As the only senators representing minority districts in the State, the eleven Appellants abruptly left the State to block senate business so that their constituents' rights and interests—which the 2/3 Rule would normally protect—would not be trampled.[3] What all this shows, of course, is that what drove the Texas Senate to abandon the 2/3 Rule in the first place was the fact that they lacked the two-thirds supermajority needed to enact a *congressional redistricting bill* under their ordinary procedures or practices. Indeed, the Governor's proclamation calling the second special session on July 28 listed only one item: "to consider legislation relating to congressional redistricting." Ex. 13. The fact that the second session was called exclusively to address congressional redistricting and that the supermajority (2/3) rule was being abandoned so that such legislation could be considered is what is relevant here for Section 5 coverage purposes.[4] It was only after one of the eleven Appellants

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[3] "Well in excess of 90% of the citizens of Texas who attended public field hearings during June and July 2003 and who took a position on redistricting (more than 6000 Texans in all), indicated that they opposed the Legislature's consideration of congressional redistrricting." Exhibits 1-11 (individual sworn statements of each of the Appellants attached to the complaint). "Because the two-thirds rule is usually considered sufficient protection for minority interests, organized efforts to block Senate action by denying it a quorum of members required to meet are rare." J.S. App. 38a.

[4] All eleven Appellants executed unrebutted sworn declarations below that "[t]he two-thirds Rule is a practice or procedure of the Texas Senate and is designed to protect a significant minority of Senators (i.e., an

decided to return to Texas that the State was able to effectuate its abandonment of the 2/3 Rule and enact a congressional map in the third special session.[5]

In the face of these events, Appellees' denial that there has been a practice of requiring a supermajority under the 2/3 Rule is bizarre.[6] It is reminiscent of the approach taken in the Deep South in the pre-Voting Rights Act days, when many officials argued that their voting procedures were not discriminatory, it was just that blacks kept failing racially neutral literacy tests. Indeed, the playing of such "shell

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excess of one-third) against any piece of legislation that is perceived to be against or harmful to their interests." *See* Exhibits 1-11. And the Appellee Lieutenant Governor said during the first special session that "he didn't intend to do away with a Senate rule that lets 11 senators block a bill from reaching the Senate floor for debate, but said such a rule would likely not be in effect should [Governor] Perry call a second session." Ex. 16.

[5] The State's Motion at 13 n.13 emphasizes that the congressional redistricting bill eventually enacted came over to the Senate from the House, leaving the impression that a supermajority 2/3 vote was not needed because it was a House bill. This is wrong, as it has been the practice of the Texas Senate to treat House bills like Senate bills and take them up only after a vote to suspend the regular order of business (which requires a supermajority vote).

[6] Indeed, just last week, Appellee Lieutenant Governor stated that in an upcoming session on school finance, he would once again use the supermajority 2/3 Rule. When asked why the 2/3 Rule hadn't applied to the third special session in 2003 when congressional redistricitng legislation was at issue, he reportedly said: "Redistricting is partisan and public education shouldn't be." *See* Clay Robison, *Dems May Get Edge on Education Debate; Dewhurst Plans to Reinstate 2/3 Rule*, Hous. Chron., March 24, 2004, at 15.

games" is precisely what led to the enactment of Section 5 of the Voting Rights Act in 1965 in the first place.[7]

If the State and the lower court are correct that changes in the legislative process are beyond the reach of Section 5, then the States will be given a safe harbor to transfer discriminatory conduct previously aimed at voters to disempowering their elected representatives. In this safe harbor, States could chip away at the power of minority voters by adopting new practices that eat away at the power of their elected officials. This would "open[] a loophole in the statute the size of a mountain." *Morse v. Republican Party of Virginia*, 517 U.S. 186, 235 (1996) (Breyer, J., concurring).

Because Section 5 coverage extends to any change affecting "any" voting "standard, practice, or procedure," it follows that any change in the 2/3 Rule applied or directed at redistricting legislation would be subject to the preclearance requirements because it changes both a long-standing "procedure" and a traditional "practice." Appellees elevate formalism over reality by arguing that the formal Senate Rules do not contain such an explicit reference. This Court

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[7] Two of the three members of the three-judge court below also sat on the three-judge court that decided the challenges to the Texas congressional redistricting plan. *See Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (three-judge court). In their decision upholding the congressional map, those two judges stated, "[d]uring the first special session, the House approved a new congressional map, but the Senate failed to do so because its 'two-thirds' supermajority rule permitted the Democrats to block a vote. To break the impasse, Lieutenant Governor Dewhurst announced that he would suspend operation of the two-thirds rule in any future special session considering congressional redistricting legislation." *Id.* at 458. These statements by a majority of the *Sessions* court (and a majority of the court below) flatly contradict Appellees' claim here that there is no 2/3 Rule.

has not countenanced such distinctions in the past, *see, e.g., Georgia v. United States*, 411 U.S. 526, 531 (1973), and it should not do so here. What matters for purposes of Section 5 coverage is whether a practice or procedure has been "in force or effect," 42 U.S.C. § 1973c, not whether the formal rules or state laws expressly provide for or authorize such practice or procedure. *See Young v. Fordice*, 520 U.S. 273 (1997), and *Perkins v. Matthews*, 400 U.S. 379 (1971).

III. The Passage of Other Legislation in the Third Special Session Does Not Moot Appellants' Claim.

Appellees make another argument that defies the reality of what happened here. Appellees contend that the abandonment of the 2/3 Rule, assuming one exists, was not aimed solely at congressional redistricting legislation. Mot. at 12-13. Appellees point out that in the third special session, which began *after* the court below had ruled in this case, no blocker bill was employed and thus the 2/3 Rule was not employed for any of the several pieces of legislation that were enacted, including the radical congressional redistricting bill. According to Appellees, the passage of other bills in the third special session without the traditional 2/3 Rule shows that Appellants' concerns about a 2/3 Rule only being applied to congressional redistricting legislation never materialized and in any event are now moot.

Appellees have given the Court only part of the story, however. It is true that there was no blocker bill in the third special session. But that is precisely why Appellants fled the State just prior to the start of the second session—because they feared the abandonment of the 2/3 Rule. And of course, because there was no 2/3 Rule in effect for the third session, the congressional redistricting bill passed. What Appellees

fail to tell the Court is that, except for three bills that related to congressional redistricting, *all* other legislation passed the senate with a supermajority vote. These three bills were: the congressional redistricting plan bill; a bill to change the primary date so the redistricting plan could be implemented; and a bill codifying fines and sanctions that had been imposed on senators who broke quorum. Thus, the only legislation affected by the abandonment of the 2/3 Rule in the third special session related to congressional redistricting legislation, which all eleven Appellants voted against. Appellees are flat wrong to claim that "Appellants' fears . . . [of] a special [simple-majority] procedure" applicable only to congressional redistricting "proved unfounded." Mot. at 13. In the third special session, legislation relating to congressional redistricting were the *only* pieces of legislation that would *not* have passed the Texas Senate if the supermajority 2/3 Rule had not been eliminated.[8]

IV. This Case is Not Moot Simply Because the State Has Obtained Preclearance of the Congressional Plan or Held Primary Elections Under It.

Appellees also claim that because the United States Attorney General precleared the State's congressional plan, that preclearance carried with it preclearance of the entire process, including the change from a 2/3 Rule to a simple-majority rule, rendering this case moot. Mot. at 10-12, 23-

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[8] The State notes that in the 1971, 1981, 1991, and 2003 sessions, the final redistricting plan enacted did not receive a 2/3 majority when enacted. Mot. at 16-17. They also note that the use of the blocker bill was not required in these sessions. *Id.* at 15. These points are irrelevant, as the *practice* followed by the Texas Senate in all of those years (except, of course, 2003) required a supermajority vote in order to allow congressional redistricting legislation to be considered.

25. Neither the State's submission letter nor the preclearance letter issued by the Department of Justice (DOJ) contains any statement that the State was seeking preclearance of the change to the 2/3 Rule or any other change in the redistricting *process*. Quite to the contrary, the State's submittal letter to DOJ—which the State failed to include in its Appendix—expressly stated that "[t]he procedure for the adoption of the change is *not* subject to preclearance." Attached hereto at 9a.

Apparently to show that DOJ approved the abandonment of the 2/3 Rule, Appellees at several points put quotation marks around the phrase "plan and the process," suggesting either that the State specifically submitted its redistricting process (including the change from a 2/3 Rule) when it submitted its congressional map for preclearance, or that DOJ precleared both the plan and process when it issued its controversial preclearance letter.[9] See, *e.g.*, Mot. at 10-11. For example, Appellees state that the Department of Justice's "December 19 preclearance of both the 'plan and the process' is entirely conclusive." *Id.* at 11. Here again, use of the quotation marks around the phrase 'plan and the process' might lead one to conclude that DOJ's preclearance letter contained such a phrase. In fact, it did not. *See* Mot. at App. E. In these circumstances, Texas neither sought nor obtained preclearance for the shift from a supermajority 2/3 Rule to a simple-majority rule for enacting congressional redistricting legislation.[10]

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[9] *See, e.g.*, Dan Eggen, *Democrats Won't Get Justice Memo*, Wash. Post, Jan. 22, 2004, at A23.

[10] This Court should give no deference to DOJ's erroneous interpretation that the change in the 2/3 Rule is not subject to Section 5 preclearance. DOJ's decision relied exclusively on this Court's decision in *Presley v. Etowah County Commission*, 502 U.S. 491 (1992). As explained in the

Appellees' other mootness argument is that the third special session has expired, primary elections have been held, and Appellants' Section 5 claims, therefore, "have already passed into history." Mot. at 9. That is wrong. *See Morse v. Republican Party of Virginia*, 517 U.S. at 235 n.48 (rejecting a claim that a Section 5 challenge to the collection of a fee at a political convention was moot because the convention had been held). Furthermore, plaintiffs' complaint sought an injunction barring the abandonment of the 2/3 Rule unless and until preclearance was obtained. J.S. App. 24a. That preclearance has not occurred. The redistricting plan enacted in the special session using the unprecleared change lives on and will remain in place for the rest of the decade absent either judicial intervention or yet another round of mid-decade redistricting by the State. The illegality is ongoing, and the Section 5 claims are not moot.[11]

CONCLUSION

This Court should summarily reverse the District Court's judgment, or alternatively, note probable jurisdiction.

Jurisdictional Statement at 12-15, that decision is plainly distinguishable from this case.

[11] Consider the following hypothetical. Assume the State adopted a rule that only Senators representing majority-Anglo districts could vote on congressional redistricting bills. A redistricting plan is then enacted using this discriminatory procedure and is precleared. Clearly, the enactment of such a plan and the conduct of elections under it would not moot claims brought by the minority officeholders that they were denied their rights under Section 5, Section 2, or the United States Constitution. In the case before this Court, the procedures used to enact Texas's most recent congressional map never underwent preclearance. A live controversy remains because those illegal procedures produced a plan that will govern congressional elections in Texas for the rest of the decade.

Respectfully submitted.

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APPENDIX

October 20, 2003

EXPEDITED CONSIDERATION REQUESTED

Mr. Joseph D. Rich
Chief, Voting Section
Civil Rights Division
Room 7254 - NWB
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

RE: Submission under Section 5. Voting Rights Act of House Bill 3, Chapter 2, 78th Legislature, Third Called Session, 2003.

Dear Mr. Rich:

The Texas Legislature has enacted House Bill 3, Chapter 2, 78th Legislature, Third Called Session, 2003 (the "Act"), which concerns the apportionment of the State of Texas into congressional districts.

Expedited Consideration:

Pursuant to 28 C.F.R. § 51.34, the State of Texas is requesting expedited consideration of the enclosed Act which will affect the 2004 primary election for congressional candidates. The filing period begins December 3, 2004. Expedited consideration is requested to ensure that candidates have sufficient time to file and that county election officials have sufficient time to prepare for the election.

Contents of Submission:

Pursuant to the requirements of 28 C.F.R. § 51.27 and § 51.28, the following information is submitted with respect to the Plan:

(a) A copy of the Act is attached and incorporated by this reference as Exhibit "A" as if fully set forth at length.

(b) The Act that is replaced is the court-imposed plan drawn by a three-judge federal panel in *Balderas, et al. v. Texas, et al.*, No. 6:01 CV-158, slip op. (E.D. Tex. Nov. 14, 2001) (per curiam), *aff'd mem.* 122 S.Ct. 2583 (2001). The opinion and judgment in *Balderas v. Texas* can be found at *http://gis1.tlc.state.tx.us/static/pdf/opinion.pdf* and *http://gis1.tlc.state.tx.us/static/pdf/judgment.pdf*, respectively.

(c) The Act was enacted to comply with the Texas constitutional requirement that the State apportion its congressional districts after the publication of the United States decennial census. Tex. Const. art. III, § 28. The Act was also enacted to comply with Article I, Section 2, Clause 3 of the United States Constitution and Section 2 of the Fourteenth Amendment which provides that congressional representatives must be apportioned among the states according to their respective populations. U.S. Const. art. 1, § 2, cl. 3, amended by U.S. Const. amend. XIV, § 2.

(d) The submitting authority is the Honorable Geoffrey S. Connor, Secretary of State of Texas, in his capacity as chief elections officer of Texas. The Secretary of

State's office may be reached at P.O. Box 12060, Austin, Texas 78711-2060, (512) 463-5650.

(e) Not applicable.

(f) Not applicable.

(g) The authority responsible for the passage of the Act was the Texas Legislature.

(h) The Act was adopted pursuant to the provisions of Tex. Const. art. III, § 28, a copy of which is attached and incorporated by this reference as Exhibit "B" as if fully copied and set forth at length. The pertinent constitutional provision can also be found on-line at: *http://www.capitol.state.tx.us/txconst/sections/cn00300-002800.html.*

(i) The Act was signed in the House of Representatives of Texas on October 12, 2003, and in the Texas Senate on October 12, 2003. The Act was signed by Governor Rick Perry on October 13, 2003. A list of actions in both the House and Senate is attached as Exhibit "C".

(j) The Act takes effect and will apply to the election of the members of Congress beginning with the primary and general elections in 2004.

(k) The provisions of the Act have not been implemented.

(l) The changes in the Act will affect the entire jurisdiction of the State of Texas.

(m) The Act will not affect members of any racial or linguistic minority differently from the way the

general public is affected. The Act does not have the intent and will not have the effect of diluting the voting strength of any racial or linguistic minority. For further information regarding the effect of the Act on minorities, you may contact any of the following minority group members residing in the jurisdiction who can be expected to be familiar with the proposed change or who were active in the political process:

The Honorable Ron Wilson
State Representative - House District 131
Member, House Redistricting Committee
Westbury Square Professional Building
5322 W. Bellfort, Suite 104
Houston, TX 77035
(713) 885-0102

The Honorable Vilma Luna
State Representative – House District 33
Member, House Redistricting Committee
4525 Gollihar, #200
Corpus Christi, TX 78411
(361)854-9816

The Honorable Michael L. Williams
Commissioner, Railroad Commission of Texas
1701 N. Congress Avenue
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(512) 463-7144

Nina Perales
Regional Counsel, Mexican American Legal Defense and Educational Fund (MALDEF)
140 East Houston Street, #300
San Antonio, TX 78205

(210) 224-5476

Jim Bowie
Black Republican Council of Texas
P.O. Box 16855
Houston, TX 77222-6855
(713) 699-0762

Margaret Moran
State Director, Texas League of United Latin American Citizens (LULAC)
P.O. Box 100931
San Antonio, TX 78201
(210) 733-0406

The Honorable Rick Morales
Mayor of Donna, Texas
518 N. 13th
Donna, TX 78537
(956) 464-1150

Gary Bledsoe
President, Texas NAACP
316 W. 12th Street, Suite 307
Austin, TX 78701
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Roy V. Casanova
Legislative Director, Republican National Hispanic Assembly
15102 Spring Bluff
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Frederick Douglas Republicans of Tarrant County
1804 Bunche Drive
Fort Worth, TX 76112
(817) 429-0679

Morris L. Overstreet
4500 Edgemont Dr.
Austin, TX 78731
(512) 453-3940

(n) The reason for the changes provided for in the Act is that Article III, Section 28 of the Texas Constitution and Article 1, Section 2 of the U.S. Constitution requires the State to apportion the State's congressional districts after the publication of the federal decennial census. The changes are also necessary to comply with the "one person, one vote" requirement of the U.S. Constitution.

For a more in-depth analysis as to the reasons for the particular changes in the Act, we have attached a narrative of the federal Voting Rights Act consideration in particular areas. The narrative was prepared by the Texas Attorney General's office, and is attached and incorporated by reference as Exhibit "D" as if fully copied and set forth at length.

(o) As of Friday, October 17, 2003, a total of ten past and pending lawsuits have been filed in Texas in 2003 relating in some way to congressional redistricting. Copies of relevant case pleadings and other proceedings from these cases are available on a CD-ROM labeled "redistricting-related pleadings," that accompanies this submission.

As a preliminary matter, *Balderas v. Texas* is the lead case from 2001 that resulted in the current benchmark plan drawn by a three-judge federal panel.

> Civil Action No. 6:01-CV-158, *Balderas, et al. v. State of Texas et al.*, in the United States District Court for the Eastern District of Texas, Tyler Division. The November 14, 2001 per curiam slip opinion, aff'd mem., 122 S.Ct. 2583 (2002), while included on a CD-ROM accompanying this submission, can also be found at *http://gis1.tlc.state.tx.us/static/pdf/opinion.pdf*, and the court's final judgment can be found at *http://gis1.tlc.state.tx.us/static/pdf/judgment.pdf*. The trial transcript is also included on the accompanying CD-ROM.

Four federal court actions were filed in mid-October 2003, subsequent to the Legislature's final passage of Plan 1374C, seeking relief against the new congressional redistricting plan.

> Civil Action No. V-03-124, *GI Forum of Texas v. State of Texas and [Governor] Rick Perry*, in the United States District Court for the Southern District of Texas, Victoria Division.
>
> Civil Action No. 2:03-CV-354. *Session, et al. v. [Governor] Rick Perry, et al.*, in the United States District Court for the Eastern District of Texas, Marshall Division.
>
> Civil Action No. 2:03-CV-356. *Jackson, et al. v. State of Texas, et al.*, in the United States

District Court for the Eastern District of Texas, Marshall Division.

Civil Action No. 6:01-CV-158, *Balderas, et al. v. State of Texas, et al.*
Civil Action No. 6:01-CV-218, *Mayfield, et al. v. State of Texas, et al.*
Civil Action No. 6:01-CV-231, *Manley v. State of Texas, et al.*

Note: These various plaintiffs, all prior litigants from 2001, have recently filed a joint pleading in the United States District Court for the Eastern District of Texas, Tyler Division. Moreover, the pleading filed under the *Balderas* caption and case number purports to continue the completed litigation from 2001–02 – *see* links above to the court's opinion and final judgment – that resulted in the court-drawn benchmark plan (though neither the court's opinion nor its final judgment assert ongoing jurisdiction over future congressional redistricting in Texas). The State has filed a "Motion for Clarification of Continuing Jurisdiction" with the three-judge panel in *Barrientos v. Texas*, a recent 2003 federal case challenging redistricting efforts on statutory and constitutional grounds, to determine which court of the various federal courts will have dominant jurisdiction over 2003 redistricting litigation.

Prior to the passage of Plan 1374C, there were two state court actions relating generally to the duty of elected lawmakers to attend legislative sessions and the State's authority to compel their attendance.

Cause No. GN 302801, *Van de Putte, et al. v. Lieutenant Governor David Dewhurst, et al.*, in the 98th Judicial District Court of Travis County, Texas.

No. 03-0726, In re *Rick Perry, Governor of the State of Texas, and David Dewhurst, Lieutenant Governor of the State of Texas and President of the Texas Senate, Realtors*, in the Supreme Court of Texas.

Also prior to passage of Plan 1374C, there were two federal court actions asserting various Voting Rights Act and constitutional challenges to the redistricting process and to the State's attempt to compel the attendance of absent legislators.

Civil Action No. 03-CV-68, *Raymond v. State of Texas, et al.*, in the United States District Court for the Southern District of Texas, Laredo Division.

Civil Action No. L-03-113, *Barrientos, et al. v. State of Texas, et al.*, in the United States District Court for the Southern District of Texas, Laredo Division (three-judge panel).

(p) The procedure for the adoption of the change is not subject to preclearance. Previous apportionment of the State into congressional districts pursuant to the

2000 federal census figures was adopted by a three-judge federal panel and not subject to preclearance.

Pursuant to the requirements of 28 C.F.R. § 51.28, the following is submitted with respect to the Plan:

Brief explanation of the Census Bureau's Race and Ethnicity Categorizations

The State of Texas has used the P.L. No. 94-171 population data from the April 1, 2000, decennial census court for redistricting. By April, 1, 2001, the Census Bureau delivered total and voting age (the number of persons age 18 and over) population data by race and ethnicity for all census geographic units in the state for use in redistricting. Other census data items are made available later in the decade as they are processed.

The State of Texas groups the population data into five race and ethnicity categories for redistricting modeling and reporting: Black, Hispanic, Black + Hispanic, Anglo, and Other. "Black" encompasses all people identifying themselves as Black, African American, or Negro on the census questionnaire, even if they also identified themselves with other racial/ethnic groups. "Hispanic" encompasses all people identifying themselves as Spanish/Hispanic/Latino, whatever their race. "Anglo" includes all people who selected "White" as their only race and not Spanish/Hispanic/Latino. "Black + Hispanic" is a combined total of all those identifying themselves as Black and all of those identifying themselves as Hispanic, adjusted so that those identifying themselves as both Black and Hispanic are not counted twice. "Other"

encompasses everyone who does not fall into any of the four classifications described above.

PLAN01151C is the current (108th U.S. Congress) congressional districts plan, and PLAN01374C is the congressional districts plan enacted by the Texas Legislature on October 10, 2003. Both plans contain 32 districts.

(a) Demographic information.

(1) Reports (RED337) evidencing the total population and voting age population before and after the change by race and language group are enclosed and incorporated by this reference in Congressional Plan Box 1 as if fully copied and set forth at length. Note: The comparison data in this section is by incumbent name rather than district number. (Note: on paper and on CD-ROM).

(2) Reports (RED215) evidencing the number of registered voters and the percent of Spanish surname registered voters by voting tabulation district (VTD) before and after the changes are enclosed and incorporated by this reference in Box 1 as if fully copied and set forth at length. The percent of Spanish surname registered voters is derived by running the Spanish surname computer tape against the statewide voter registration master file. (Note: on CD-ROM only).

We do not collect information regarding race in voter registration; therefore, we are unable to provide information regarding the number

of African Americans who are registered voters.

(3) No estimates were relied upon in connection with the adoption of the change.

(4) Demographic data is based on the Bureau of the Census Public Law 94-171 file.

(5) The blkcongress.csv file (included in the Shapefiles folder reference below) contains the census block to district assignments in the prescribed format for the current congressional district (PLAN01151C) and the congressional districts enacted by the Legislature (PLAN01374C).

(b) Maps.

(1) Maps evidencing current and new boundaries of the congressional districts are enclosed and incorporated by this reference in Congressional Plan Box 1 as if fully copied and set forth at length.

(2) Maps evidencing current and new boundaries of the congressional districts and showing the location of racial and language minority groups are enclosed and incorporated by this reference in Congressional Plan Box 1 as if fully copied and set forth at length. These maps include a statewide map shaded by race/ethnicity at the county level and maps of each split county shaded by race/ethnicity at the VTD level for the following categories:

i. Black Total Population
ii. Black Voting Age Population
iii. Hispanic Total Population
iv. Hispanic Voting Age Population
v. B+H Total Population
vi. B+H Voting Age Population
vii. Spanish Surname Registered Voters

(3) Maps evidencing current and new district boundaries with natural boundaries are enclosed and incorporated by reference in Congressional Plan Box 1 as if fully copied and set forth at length. Maps of each split county are included.

(4) Maps evidencing current and new district boundaries with city boundaries are enclosed and incorporated by reference in Congressional Plan Box 1 as if fully copied and set forth at length. Maps of each split county are included.

All maps referenced above have been provided in duplicate. The Congressional Plan does not adopt any changes to the locations of any polling places, voter registration sites, or voting precinct boundaries: therefore, no such maps are included.

(c) Not applicable.

(d) Election returns, election related data and other plan reports, shapefiles, the block equivalency file, and a table of contents are accompanying this submission.

Some reports are also submitted on paper, as noted. The information is indexed as follows:

(1) **Election Data folder**

readme.txt – describes the data in the other files
candidate.dbf – contains candidate names, office, race/ethnicity, and votes received
returns.zip – votes cast by VTD for all elections and offices (this file is in dbf, zipped)
voterreg.dbf – voter registration data by VTD, including election, county/VTD, total voter registration, and Spanish Surname and Non-Spanish Surname voter registration

(2) **Reports folder**

i. Election Reports folder

PLAN01151C Election Reports – RED225 – by district report of election returns by year for each candidate for all-statewide contests and districted contests and including local contests in the six large metropolitan counties (Note: on CD-ROM only)
1992, 1994 – general election
1996, 1998, 2000, 2002 – democratic and republican primaries and runoffs and general election

PLAN01374C Election Reports – same information as above

ii. Plan01151C report packet.pdf – redistricting reports consisting of:
RED100 – Population Analysis with County Subtotals
RED140 – Split Cities and CDPs
RED200 – Population and General Election History
RED310 – Unassigned Geography
RED315 – Compactness
REC350 – Incumbents by District

(Note: on paper and on CD-ROM)

iii. Plan01151C voter reg by VTD.pdf – RED215 report listing total and percent Spanish surname voter registration; turnout total and turnout/registered voters; statewides for Democrats and Republicans (statewides is a weighted average of the results of all general election statewide contested contests in that general election); and the number and percent voters for the 2002 general election governor contest for all VTDs in the state by district. (Note: on CD-ROM only).

iv. Plan01374C report packet.pdf – redistricting reports listed above (ii) for Plan01151C, with two additional reports (Note: on paper and on CD-ROM) that compare the plan enacted by the Legislature with the current plan:

RED337 – Two Plan Comparison by Incumbent (with the number and percent voters for the 2002 general election lieutenant governor contest) RED340 – Plan Overlap Analysis, showing the percent of the current districts that make up the new districts.

v. Plan01374C voter reg by VTD.pdf – RED215 report – same as file description (iii) for Plan01151C.

(3) **Shapefiles folder**

i. ESRI shapefiles for all public congressional plans prepared for the Legislature – includes a Table of Contents listing the plan names and dates the plans were created.

ii. blakcongress.csv – the block equivalency file containing the current congressional districts and the congressional districts enacted by the Legislature.

iii. project.txt – the projection used for the shapefiles.

(e) Not applicable.

(f) Publicity and Participation.

(1) Senate Publicity and Participation

The Texas Senate engaged in significant publicity and invited public participation in the redistricting process. The Senate Committee on Jurisprudence conducted seven regional hearings and met seven times in Austin during the First Called Session alone. During the Third Called Session, the Committee met twice in Austin.

i. Regional Hearings

Notice and Participation

After learning that the First Called Session was to begin on June 30, 2003, the Senate Committee on Jurisprudence planned a series of seven regional hearings throughout the State of Texas. Upon consulting with both Democrat and Republican Committee members, the Committee scheduled regional hearings in five cities: Laredo, San Angelo, McAllen, Houston and Dallas. These cities were selected because these areas had the greatest likelihood of being impacted by changes to the congressional districts. Two cities, Corpus Christi and Waco, were added later to accommodate specific requests.

At each of the public hearings, witness affirmation cards were available in

English and Spanish where each person registered his or her position on redistricting and indicated whether he or she wished to testify.[1] Each individual who wished to testify was given an opportunity to do so, which required the Committee members and staff, on several occasions, to stay late into the evening or early hours of the morning. The Committee also provided English and Spanish translation services at each of the regional hearings. The existence of these services was announced regularly during each of the hearings.

Prior to the holding of each hearing, the Committee purchased an advertisement in the local major newspaper to publicize the Committee's meeting in that particular location. Advertisements were also placed in Spanish-language newspapers in some markets. Copies of these advertisements are enclosed in Texas Senate Box 1.

In addition to the advertisements, the Texas Legislative Council assisted the Committee in distributing notice of the regional hearings as follows:

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[1] The Committee took testimony on redistricting in general during the regional hearings. There were no maps provided for discussion other than the map drawn by the federal panel and in place at that time (PLAN1151C).

- Posted the notice in English and Spanish on the Legislative Council redistricting website;

- Faxed the notice to members of Congress (except Rep. Ron Paul, whose office requested e-mail, and Rep. John Culberson, whose fax machine was out of order);

- Mailed the notice to interested parties (English and Spanish copies were mailed to interested Hispanic organizations);

- Faxed Spanish and English copies of the notice to the Hispanic media; and

- Mailed and faxed the notice to the Vietnamese media.

A list of the Legislative Council's contacts and a copy of the notice are enclosed in Texas Senate Box 1.

Testimony at each regional hearing was recorded by a certified court reporter. Copies of those transcripts can be found at the Senate Committee on Jurisprudence website at *http://www.senate.state.tx.us/75r/Senate/commit/c550/c550.htm*. Also found at this website are the minutes from

each of the hearings, which include a list of all witnesses, those testifying and those wishing only to register a position. Copies of the minutes can also be found in Texas Senate Box 1. Additionally, written testimony or other hand-outs provided to the Committee from all of the hearings are included in Texas Senate Box 1.

Laredo, Texas

The first hearing was held on Saturday, June 28, 2003, in Laredo, Texas at Texas A&M International University. This location was selected by the local senator, Judith Zaffirini, a Hispanic Democrat. During this hearing which lasted for approximately five hours, the Committee received approximately 114 witness affirmation cards and heard testimony from all witnesses who desired to speak.

San Angelo, Texas

The second hearing was held on Monday, June 30, 2003, in San Angelo, Texas at Angelo State University. This location was chosen by the local senator and Chairman of the Committee, Robert Duncan, a rural Anglo Republican. During this hearing which lasted for approximately four and a half hours,

the Committee received approximately 166 witness affirmation cards and heard testimony from witnesses desiring to speak.

McAllen, Texas

The third hearing was held on Tuesday, July 1, 2003, in McAllen, Texas at the McAllen City Hall. The location of this hearing was determined by the local senator, Juan "Chuy" Hinojosa, a Hispanic Democrat. This public hearing lasted for approximately five and a half hours and each individual who wished to testify was given the opportunity to do so. The Committee received approximately 355 witness affirmation cards.

During the McAllen hearing, community activists (from Corpus Christi) disrupted the meeting in a manner that temporarily prohibited the Committee from taking testimony. After discussion and negotiation, the activists agreed to stop the disruption and the Committee agreed to hold a hearing and take testimony in Corpus Christi. Thereafter, a hearing was scheduled in Corpus Christi for July 7, 2003 (see below).

Houston, Texas

The fourth hearing was held on Wednesday, July 2, 2003, in Houston, Texas at Cesar Chavez High School located at 8501 Howard Drive. The local senator, Mario Gallegos, a Hispanic Democrat and Vice-Chair of the Committee, selected this location. This public hearing lasted for approximately nine hours and each individual who wished to testify was given the opportunity to do so. The Committee received approximately 285 witness affirmation cards.

Corpus Christi, Texas

The fifth hearing has held on Monday. July 7, 2003, in Corpus Christi, Texas at the Solomon Ortiz Convention Center. Senator Juan "Chuy" Hinojosa hosted the Committee at this location as well. The Committee received approximately 255 witness affirmation cards during the hearing which last for approximately seven and a quarter hours. Each witness who wished to testify was given the opportunity to do so.

Dallas, Texas

The sixth hearing was held on Tuesday, July 8, 2003, in Dallas, Texas at the University of North Texas

System Center. This location was specifically chosen by Senator Royce West, an African-American Democrat who is also a member of the Committee. This hearing was originally scheduled for Monday, July 7th; however, at the request of the Dallas minority community, the hearing was moved to Tuesday to accommodate the funeral of Reverend Gregory Spencer. This public hearing lasted for approximately eleven and a half hours and each individual who wished to testify was given the opportunity to do so. The Committee received approximately 866 witness affirmation cards.

Senator West, in choosing the location of the hearing, based his decision on past attendance patterns. However, the attendance level in Dallas was much greater than the Committee had previously expected; thus it was necessary for the Committee to work with the fire marshal to alleviate overcrowding. Two overflow rooms were ultimately provided with audio and/or video links to the Committee hearing. Despite this inconvenience, all members of the public were encouraged and were given the opportunity to testify.

Waco, Texas

At the request of Committee member, Senator Kip Averitt, an Anglo Republican, the last hearing was held on Wednesday, July 9, 2003, in Waco, Texas at the Baylor University School of Law. The Committee received approximately 579 witness affirmation cards and heard testimony from any witness who requested to testify. The hearing lasted approximately eleven and a half hours.

ii. **Austin Hearings**

In addition to the seven regional hearings, the Senate Committee on Jurisprudence held nine hearings in Austin. The first seven were held during the First Called Session on the following dates: July 14, 15, 16, 17, 18, 21, and 22. All of these hearings were held in the Auditorium of the Capitol Extension. Each hearing was posted for public notice in the same manner as all other legislative hearings and consistent with the Rules of the Texas Senate. These postings can be found on the Senate Committee on Jurisprudence website at *http://www.senate.state.tx.us/75r/Senate/commit/c550/c550.htm*. The Committee received witness affirmation cards from approximately 451 witnesses. All witnesses who

wished to testify during these seven hearings were given the opportunity to do so.

At the hearings on July 14-16, 2003, the Committee took testimony on redistricting in general and on House Bill 3. No Senate maps were presented for discussion until July 17, 2003, when Senator Todd Staples laid out PLAN 1313C. On July 18, 2003, the Committee also discussed PLAN 1314C by Senator Jeff Wentworth. In response to public testimony and senators' questions and concerns, at the July 21st hearing, Senator Todd Staples laid out two additional plans, PLAN 1324C and PLAN 1325C. Finally, on July 23, 2003, Senator Todd Staples laid out a Committee Substitute to H.B. 3 (PLAN 1327C).

On July 23, 2003, the Committee voted out Senator Todd Staples' Committee Substitute to H.B. 3 (PLAN 1327C) by a vote of 4 to 3. The First Called Session expired prior to consideration of Committee Substitute to H.B. 3 on the Senate floor.

iii. **Second Called Session**

The Second Called Session began on July 28, 2003. Due to the lack of a quorum, neither the Senate as a whole,

nor the Jurisprudence Committee, took any action regarding redistricting.

iv. **Third Called Session**

The Third Called Session began on September 15, 2003. Once again, the redistricting bills were referred to the Jurisprudence Committee. The Committee heard testimony on Senate Bill 1 on September 17, 2003. Its author, Senator Todd Staples, explained the map and was thoroughly questioned by the other members of the Committee. The Committee received approximately 58 witness affirmation cards and each witness who desired to testify was given the opportunity to so do. The bill was left pending waiting for the House Bill (H.B. 3) to be received by the Senate and referred to the Committee.

On September 19, 2003, the Committee considered Senator Staples' Committee Substitute to H.B. 3 (CSHB 3). Senator Staples' substitute map was virtually identical to the map he had laid out as S.B. 1 with a few minor changes. No public testimony was taken as no significant changes had been made to the map. The Committee voted out C.S.H.B. 3 by a vote of 4 to 3.

C.S.H.B. 3 was taken up by the full Texas Senate for debate on second reading on September 23, 2003. The bill was finally passed the next day with a vote of 18 to 12. The Texas House of Representatives refused to concur in the Senate amendments and the bill was sent to a conference committee. The Conference Committee Report was printed and distributed on October 9 ,2003 and was considered by the full Senate on October 10, 2003. The Conference Committee Report for C.S.H.B. 3 was adopted by the Texas Senate on October 12, 2003 by a vote of 17 to 14.

v. **Submitted Materials**

The redistricting record compiled by the Senate Committee on Jurisprudence consists of many items, some of which are referenced herein and are available on the Committee's webpage (e.g. hearing transcripts, audio recordings). In addition to those items, the following documents are being submitted.

- Copies of the regional hearing notices (Texas Senate Box 1);
- Copies of the hearing minutes with witness lists (Texas Senate Box 1);

- Copies of memoranda from the Legislative Council outlining notice activities (Texas Senate Box 1);
- Copies written testimony received by the Committee at the public hearings (Texas Senate Box 1);
- Copies of correspondence received by the Committee or its members, the Lieutenant Governor's Office and other senators (Texas Senate Boxes 1 & 2); and
- Copies of other relevant documents on redistricting (Texas Senate Box 1).

(2) **House Publicity and Participation**

There was a large amount of both publicity and participation in the Texas House congressional redistricting process.

i. **House of Representatives, 78th Regular Session**

On January 30, 2003, Speaker Tom Craddick announced the appointment of the members of the House Committee on Redistricting.

On February 11, 2003, Chairman Joe Crabb requested an official opinion from Attorney General Greg "about the Texas Legislature's legal rights

and responsibilities in connection with congressional redistricting following the 2000 census." (Request No. 0017-GA). On February 14, 2003, OAG Opinion Committee Chair Nancy Fuller contacted a list of interested parties, asking for briefs to be submitted by February 14, 2003. On February 18 and 19, Ms. Fuller contacted additional parties for briefs. Then, on February 20, the deadline for the briefs was extended via fax to March 7, 2003. On April 23, 2003, Attorney General Greg Abbott delivered his formal opinion, which is available on-line at *http:/www.org.state.tx.us/opinopen/opinions/op50abbott/ga-0063.htm.*

During the 78th Regular Session of the Texas Legislature, the House Committee on Redistricting convened in a public hearing and accepted public testimony on congressional redistricting on six separate occasions at the Capitol. On the first four of these occasions, testimony was exhausted in the sense that the committee remained until all witnesses present were given the opportunity to speak.

Beyond the typical notification and publicity practices of the Texas House of Representatives (in which notices are posted in advance around the

Capitol and on the Internet), extraordinary efforts were used to publicize the May 2 and May 3 public hearings. A memorandum by Chairman Joe Crabb, dated April 30, 2003, was sent to the following mailing lists:

- The Texas Congressional delegation.
- A list of the parties involved in *Balderaus v. State of Texas* lawsuit;
- The Office of Attorney General's list of parties notified regarding Request No. 0017-GA;
- RedAppl clients 2001-2002; and
- The list of parties notified on the 2000 regional redistricting hearings.

Contact was made via certified letter, FEDEX, telephone , fax, email, and/or hand delivery.

Ultimately, the House Committee on Redistricting adopted a map (PLAN 01180C), and the House Committee on Calendars scheduled the floor debate. The congressional redistricting effort ended without a floor debate due to deadlines in the House Rules and a lack of quorum for several days in the House of Representatives.

ii. **Interim Regional Hearings**

On June 20, 2003, Chairman Joe Crabb announced the creation of three subcommittees on congressional redistricting and six regional public hearings in San Antonio, Lubbock, Brownsville, Houston, Dallas, and Nacogdoches.

Beyond the typical notification and publicity practices of the Texas House of Representatives, extraordinary efforts were used to publicize these public hearings. Notices were posted around the Capitol in both English and Spanish. House Administration distributed notice to all House members and staff. The Speaker's Press Office distributed notice to the news media in English and Spanish. And Texas Legislative Council:

- posted notice on the Council's redistricting website in English and Spanish;
- distributed notice to Senators' and the Lieutenant Governor's Capitol mailboxes;
- faxed notice to members of Congress (except Representative Ron Paul, whose office requested e-mail);
- mailed notice to interested parties (Spanish and English

copies were sent to interested Hispanic organizations);

- mailed notice via certified mail to the same list of interested parties;
- faxed Spanish and English copies of the notice to Hispanic media; and
- mailed and faxed notice to Vietnamese media.

At all regional hearings, clerks distributed to the audience handouts entitled "Tools for Redistricting" and "Subcommittee on Congressional Redistricting Rules Governing Operations" in both English and Spanish. Two large maps were on display: (i) the court-drawn map (PLAN 01151C), and (ii) the committee map from the regular session (PLAN01180C). Single-page versions of these maps were also made available to the public.

At all regional hearings, a Spanish-language translator was on hand and made available for members of the public. In addition, at the Houston regional hearing, a Vietnamese-language translator was on hand and made available for members of the public.

The Lubbock and Nacogdoches regional hearings exhausted testimony

in the sense that committee remained until all witnesses present were given the opportunity to speak.

In Brownsville, one member of the subcommittee left the room before the start of the meeting and refused to make a quorum. In addition, demonstrators disrupted the Brownsville hearings, resulting in less testimony at this hearing. However, the committee's address and fax number were publicized on handouts, and Chairman Joe Crabb repeatedly encouraged the submission of written testimony. Chairman Crabb and the clerks stayed until the published adjournment time of 8 p.m., in an attempt to outlast the demonstrators and resume taking testimony.

A court reporter transcribed each regional hearing.

iii. **First Called Session**

On June 30, 2003, the House Committee on Redistricting convened in a formal meeting to discuss the testimony from the regional public hearings. Public testimony is not allowed at a formal meeting. On July 1, July 2, and July 3, the committee convened in a public hearing and accepted public testimony on congressional redistricting at the

Capitol. At each of these hearings, testimony was exhausted in the sense that committee remained until all witnesses present were given the opportunity to speak. On July 5, 2003, the committee entertained legislator testimony (but not public testimony) and adopted a map (PLAN 01268C).

The House passed this map with no amendments. The First Called Session expired without the Senate voting on map.

iv. **Second and Third Called Sessions**

During the Second Called Session, the House voted to suspend the rules to bypass the committee process and adopted the same map adopted in the First Called Session (PLAN 01268C). No additional public testimony was taken. The Second Called Session expired without action in the Senate due to a lack of a quorum.

During the Third Called Session, the House Committee on Redistricting met in a formal meeting on September 15, 2003. The committee passed the same map as in the First Called Session (PLAN 01268C). Public testimony is not allowed at a formal meeting. In addition, the committee passed House Resolution 43 clarifying that prior testimony, information, debate, and

remarks are part of the legislative history of House Bill 3, 78th Legislature, 3rd Called Session. Both the map (PLAN 01268C) and the resolution passed the full House later in the week.

v. **Publicity in the Media and on the Internet**

The media coverage of the redistricting process has been extensive. Over 1400 articles from print media are compiled on a CD-ROM that is included with the submitted materials.

The web site of the Texas House of Representative (*http://www.house.state.tx.us/welcome.php*) among other things, announces the schedules for committee meetings and floor debates; provides minutes, journals, and broadcast archives; and publishes the status of legislation.

The Texas Legislative Council web site (*http://www.tlc.state.tx.us/research/redistr/redist.htm*), which can be reached through a link from the House web site, has a dedicated area to redistricting, which provides:

- news, including announcement of hearings (often in Spanish as well as English);
- information on all published maps, by legislators or the public;
- a history of redistricting; and
- census and district demographics and statistics.

vi. **Submitted Materials**

The submitted materials include the following:

- the extraordinary notice and postings, in both English and Spanish;
- two memoranda from Texas Legislative Council with contact information of the interested parties and the media;
- handouts from the regional public hearings, in both English and Spanish;
- minutes for all committee meetings, including the subcommittee public hearings;
- witness lists for all public hearings where public testimony was taken;
- House Resolution 43;
- Witness Affirmation Forms for those who did not testify;

- all written testimony submitted to the committee;
- the collected and indexed correspondence of the House Committee on Redistricting, including the interactions with Attorney General Greg Abbott and OAG Opinion Committee Chair Nancy Fuller.
- transcripts of the regional hearings; and
- CD-ROMs containing press clippings.

The video broadcast archives for the public hearings at the Capitol, as well as the audio archives and transcripts for the regional public hearings, are available on the internet at: *http://www.house.state.tx.us/committees/redistricting.php*.

(g) Availability of Submission.

The follow notice has been submitted to the Texas Register for publication and will appear in the October 31, 2003 issue; it will also be placed on the Texas Secretary of State's website:

The State of Texas has submitted its redistricting plans for Texas Congressional Districts, to the United States Department of Justice for its review under Section 5 of the federal voting Rights Act, 42 USC § 1973c. A complete duplicate copy of the submission

is available for public review in the Office of the Secretary of State, Elections Division, 208 E. 10th Street, Suite 309, Austin, Texas 78701. (800) 252-VOTE (8683). The information will be available from 8:00 a.m. to 5:00 p.m., Monday through Friday. any comments regarding the submission may be sent to:

Chief, Voting Section
Civil Rights Division
Department of Justice
Room 7254-NWB
950 Pennsylvania Ave., NW
Washington, DC 20530

Thank you for expediting consideration of this important request. If you have any questions or need additional information, please contact Mark McHargue, Staff Attorney, Elections Division, at (512) 463-5650 or Don Willett, Deputy Attorney General for Legal Counsel, Office of the Texas Attorney General, at (512) 936-1884.

Sincerely,

Geoffrey S. Connor

Enclosures

GSC:AM:MM:id